1330 No. 3941

United States 1330
Circuit Court of Appeals

For the Ninth Circuit.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff in Error,

vs.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN; and NETTIE M. AUSTIN, as Trustee,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[1*] In the District Court of the United States for the Eastern District of Washington. Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS, HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Foreign Corporation,

Defendants.

Names and Addresses of Attorneys of Record.

E. E. WAGER, JAMES C. LLOYD, Address, Ellensburg, Washington,

Attorneys for Plaintiffs.

JOHN B. VAN DYKE, JOSIAH THOMAS, Address, Lowman Bldg., Seattle, Wn.,

J. D. CAMPBELL, Address, Old Nat'l Bank Bldg., Spokane, Washington.

Attorneys for Defendants.

*Page-number appearing at foot of page of original Transcript of Record.

In the Superior Court of the State of Washington in and for Benton County.

No. 3083.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN, and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendants.

Complaint.

The plaintiffs complain of the defendants and allege:

I.

That all times in this complaint mentioned the plaintiffs Levi F. Austin and Jay R. Austin were, and still are, copartners engaged in the business of farming and stock-raising in Benton County, State of Washington, under the firm name and style of Austin Bros.

II.

That the plaintiff Helen S. Austin is, and at all times in this complaint mentioned was, the wife of the plaintiff Levi F. Austin.

III.

That the plaintiff Nettie M. Austin is the mother

of the plaintiff Jay R. Austin, and now holds, and at all times in this complaint mentioned did hold, in trust for said Jay R. Austin the legal title to an undivided one-half of the following described premises, situate, lying and being in said Benton County, to wit:

The northeast quarter of the southwest quarter of section four (4) in township numbered thirteen (13) north of range twenty-five (25) east of the Willamette Meridian; the legal title and ownership to the remaining moiety of said land being in the plaintiff Levi F. Austin.

[2] IV.

That the defendant is, and at all times in this complaint mentioned was, a foreign corporation organized and existing under the laws of the State of Illinois, and privileged and authorized to transact business in the State of Washington.

V.

That the plaintiffs Levi F. Austin and Jay R. Austin, as such copartners aforesaid, occupy and cultivate in addition to the land hereinbefore described, the north half of the southeast quarter of said section four (4) under the lease of the owner thereof running for five years from the 27th day of October, 1917, with re-leasing privilege.

VI.

That all of said land, excepting only a small acreage thereof is devoted to the cultivation and production of alfalfa, and the greater part thereof has been producing the average yield of alfalfa, common to that section of country, for several

years last past, while a small portion of said acreage has been more recently sown in alfalfa and is of a younger growth.

VII.

That said lands are situated in an arid country and no crops can be raised thereon without irrigation.

VIII.

That on the 25th day of September, 1919, the plaintiffs Levi F. Austin and Jay R. Austin, copartners as Austin Bros., entered into a contract in writing with defendants, which was executed by all parties thereto and duly and mutually delivered, whereby defendants agreed, for certain valuable considerations, more fully set forth in said contract, to furnish and deliver to said plaintiffs, Austin Bros., a certain oil engine of 25 H. P., and a certain 8-inch pump, together with pulleys, belts and other accessories, for the agreed price of two thousand four hundred and thirty dollars ($2430.00) on car at Seattle, Washington, and to be shipped by defendants to said plaintiffs, Austin Bros. at Haven, Washington, on Chicago, [3] Milwaukee & St. Paul Railway, so that delivery could and should be made to said Austin Bros. by December 1, 1919, at said Haven station.

IX.

That a copy of said contract and agreement, referred to in the last paragraph hereof, is hereto annexed and made a part of this complaint, and incorporated herein, and marked Plaintiffs' Exhibit "A."

X.

That plaintiffs Austin Bros., at the time of making said contract paid to the defendant the sum of two hundred dollars ($200.00) in pursuance of said contract.

XI.

That the plaintiffs Austin Bros. were ready and willing to receive said property so contracted to be delivered, and to pay for the same, according to the terms of said contract, and to perform all conditions of said contract, at the time and place aforesaid, of which the defendants had notice, and the said plaintiffs aver that they have fully and faithfully performed and fulfilled all and singular covenants and agreements in the said contract contained on the part of said plaintiffs.

XII.

That the said defendants, totally neglected and disregarding their duties and obligations, under said contract, failed and refused to deliver to said plaintiffs Austin Bros. the said property so agreed to be furnished and delivered to plaintiffs under said contract at said Haven station or elsewhere.

XIII.

That defendants, their agents and servants, by false statements, and misrepresentations made to plaintiffs Austin Bros. between the 1st day of December, 1919, and the 1st day of March, 1920, inclusive, as to the shipment and the status of said machinery contracted for as aforesaid, induced plaintiffs Austin Bros. to rely upon the intention, ability and good faith of defendants, to furnish

the same until on or about the 30th day of March, 1920, when plaintiffs, Austin Bros. dispairing of the intention, or ability or [4] good faith of said defendants to furnish said machinery gave said defendants notice of rescission of said contract upon the part of plaintiffs Austin Bros. and of said plaintiffs' demand for return of the said amount of money, advanced to defendants upon said contract, and for payment to plaintiffs Austin Bros. of such damages as said plaintiffs might suffer by reason of defendants' failure, neglect and refusal to fulfill their said contract and obligation.

XIV.

The plaintiffs Austin Bros., having abandoned their then existent system of irrigation after entering into said contract with defendants, and because of their reliance upon the fulfillment of said contract by defendants, had deprived themselves of any other means of irrigating their said land except by construction of a new system of pumping or installation of other machinery.

XV.

That by reason of defendants' failure to fulfill its said contract, and deliver said machinery to plaintiffs Austin Bros. as in said contract agreed, plaintiffs have sustained damage in the sum of seven thousand dollars ($7000.00), no part of which has been paid.

And for another and further cause of action against defendants plaintiffs state as follows:

I.

That at all times in this complaint mentioned the

plaintiffs Levi F. Austin and Jay R. Austin were, and still are, copartners engaged in the business of farming and stock raising in Benton County, State of Washington, under the firm name and style of Austin Bros.

II.

That the plaintiff Helen S. Austin is, and at all times in this complaint mentioned, was the wife of the plaintiff Levi F. Austin.

[5] III.

That the plaintiff Nettie M. Austin is the mother of the plaintiff Jay R. Austin, and now holds, and at all times in this complaint mentioned did hold, in trust for said Jay R. Austin the legal title to an undivided one-half of the following described premises situate, lying and being in said Benton County, to wit:

The northeast quarter of the southwest quarter of section four (4) in township numbered thirteen (13) north of range twenty-five (25) east of the Willamette Meridian; the legal title and ownership to the remaining moiety of said land being in the plaintiff Levi F. Austin.

IV.

That the defendant is, and at all times in this complaint mentioned was, a foreign corporation organized and existing under the laws of the State of Illinois, and privileged and authorized to transact business in the State of Washington.

V.

That the plaintiffs Levi F. Austin and Jay R. Austin, as such copartners aforesaid, occupy and

cultivate, in addition to the land hereinbefore described, the north half of the southeast quarter of said section four (4) under a lease from the owner thereof running for five years from the 27th day of October, 1917, with releasing privilege.

VI.

That all of said land, excepting only a small acreage thereof, is devoted to the cultivation and production of alfalfa, and the greater part thereof has been producing the average yield of alfalfa, common to that section of country, for several years last *page* while a small portion of said acreage has been more recently sown in alfalfa and is of a younger growth.

VII.

That said lands are situated in an arid country and no crops can be raised thereon without irrigation.

[6] VIII.

That on the 25th day of September, 1919, the plaintiffs Levi F. Austin and Jay R. Austin, copartners as Austin Bros., entered into a contract in writing with defendants, which was executed by all parties thereto and duly and mutually delivered, whereby defendants agreed, for certain valuable considerations, more fully set forth in said contract, to furnish and deliver to said plaintiffs Austin Bros a certain oil engine of 25 H. P., and a certain 8-inch pump, together with pulleys, belts and other accessories, for the agreed price of two thousand four hundred and thirty dollars (2430.00) on car at Seattle, Washington, and to

be shipped by defendants to said plaintiffs Austin Bros., at Haven, Washington, on Chicago, Milwaukee & St. Paul Railway, so that delivery could and should be made to said Austin Bros., by December 1, 1919, at said Haven station.

IX.

That a copy of said contract and agreement, referred to in the last paragraph, is hereto annexed and made a part of this complaint, and incorporated herein, and marked Plaintiffs' Exhibit "A."

X.

That the said plaintiffs Austin Bros. at the time of making said contract paid to the defendants the sum of two hundred dollars ($200.00) in pursuance of said contract.

XI.

That the plaintiffs Austin Bros. were ready and willing to receive said property so contracted to be delivered, and to pay for the same, according to the terms of said contract, and to perform all conditions of said contract, at the time and place aforesaid, of all which the said defendants had notice, and the said plaintiffs aver that they have fully and faithfully performed and fulfilled all and singular the covenants and agreements in the said contract contained on the part of said plaintiffs.

[7] XII.

That the said defendants, totally neglecting and disregarding their duties and obligations, under said contract, failed and refused to deliver to said

plaintiffs Austin Bros. the said property so agreed to be furnished and delivered to plaintiffs under said contract at said Haven station or elsewhere.

XIII.

That defendants, their agents and servants, by false statements and representations made to plaintiffs Austin Bros. between the 1st day of December, 1919, and the 1st day of March, 1920, inclusive, as to the shipment and status of said machinery, contracted for as aforesaid, induced plaintiffs Austin Bros to rely upon the intention, ability and good faith of defendants, to furnish the same until on or about the 30th day of March, 1920, when plaintiffs Austin Bros., dispairing of the intention, or ability of said defendants to furnish said machinery, gave said defendants notice of rescission of said contract upon the part of plaintiffs Austin Bros. and of said plaintiffs' demand for return of the said amount of money, advanced to defendants upon said contract, and for payment to plaintiffs Austin Bros. of such damages as said plaintiffs might suffer by reason of defendants' failure, neglect and refusal to fulfill their said contract and obligation.

XIV.

The plaintiffs Austin Bros., having abandoned their then existing system of irrigation after entering into said contract with defendants and because of their reliance upon the fulfillment of said contract by defendants, had deprived themselves of any other means of irrigating their said

land except by construction of a new system of pumping or installation of other machinery.

XV.

That plaintiffs Austin Bros., dispairing of any attention, on the part of said defendants, to said contract or to their duties or obligations thereunder, did on or about the 30th day of March, 1920, proceed to secure and apply the most expeditious and effective means, then known to them of saving as much of the said growing crops [8] of alfalfa, on said premises, as could be saved by irrigating said land at such a late stage of the season, and of preventing as far as possible, permanent injury to the said alfalfa meadows.

XVI.

That after much delay, labor and expense, plaintiffs succeeded in securing a right to connect with a certain hydro-electric power system already installed on an adjoining property and to take power from the same, and thereafter immediately constructed therefrom a transmission power line to their said land and installed thereon an electric motor and pump and pumping system, and by *this* means were able, after much delay, to pump the necessary water to irrigate the said land, and to save as much as possible the crops thereon, and to minimize the damage to their said meadows by reason of the lack of irrigation of the same until so late a stage of the season, through failure of said defendants to fulfill their said contract.

XVII.

That plaintiffs have suffered damage in the cost

of the privilege to connect with said hydro-electric power system and the building of said transmission line and the installation of said electric pump and motor and other expenses incident to the installation of said hydro-electric system in the sum of eighteen hundred dollars ($1800.00) no part of which has been paid.

WHEREFORE plaintiffs pray for judgment against defendant corporation as follows:

I.

For general damages in the sum of seven thousand dollars ($7,000.00), and for the same of two hundred (200) dollars advanced as alleged in paragraph ten (10) hereof.

II.

For special damages in the sum of eighteen hundred dollars ($1800.00).

III.

For plaintiffs' costs and disbursements in this behalf expended.

EUGENE E. WAGER and
JAMES COLLINS LLOYD.

[9] State of Washington,
County of Kittitas,—ss.

James Collins Lloyd, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiffs, in the above-entitled cause and makes this affidavit on behalf of said plaintiffs for the reason that none of said plaintiffs are now within this county, and for the further reason that all of the material allegations of this com-

plaint are within the personal knowledge of this affiant.

That affiant has read the annexed and foregoing complaint; knows the contents thereof and believes the same to be true.

JAMES COLLINS LLOYD.

Subscribed and sworn to before me this 16th day of February, 1921.

BERNICE N. CHADWICK,
Notary Public, Residing at Ellensburg, Wn.

Filed with Summons and Plaintiffs' Exhibit "A," Mar. 15, 1921, at 8:25 A. M.

[10] **Plaintiffs' Exhibit "A."**

FAIRBANKS, MORSE & CO.

(Incorporated)

GENERAL PROPOSAL.

Sept. 25, 1919.

To Austin Bros.
Beverly, Wash.

We hereby propose to furnish and deliver F. O. B. cars at Seattle, Wash., the following as per specifications below, or in car from factory provided the car can be made up.

ITEMS.

1 25-H. P. Type "Y" oil engine fitted with 40"x10" F. C. Pully "Havana Pot" and exhaust pipe.

1 8" A. H. Z. Y. B. split case pump fitted with 14" Dian x 10" crown face pully.

1 8x10 Dis. *Eill.*

40 ft. 8″ 6-ply test special belt.

1 set foundation bats for engine.

DELIVERY.

Shipment so delivery Dec. 1, 1919, will be made to be shipped to Austin Bros. at Havin, Wash., via (Railroad Station) Milwaukee. (Give railroad if any preference.)

Additional equipment may be listed on the back of this sheet under heading "Additional Equipment" and will then be furnished by us under this proposal.

GUARANTY.

The machinery herein specified is guaranteed by us to be well made, of good material and in a workmanlike manner. If any parts of said machinery fail through defect in workmanship or material within one year from date of shipment thereof, this Company will replace such defective parts, free of charge, F. O. B. cars our factory, but this Company will not be liable for repairs or alterations unless the same are made with our consent and approval. This Company will not be liable for damages or delays caused by such defective material or workmanship, and it is agreed that its liability under all guarantees is expressly limited to the replacing of parts failing through defect in workmanship or material, free of charge, f. o. b. its factory, within the time and in the manner aforesaid. [11] Parts claimed to be defective are to be returned to us at our option, transportation prepaid.

ADDITIONAL EQUIPMENT.

The following equipment is included in the purchase price of this proposal, and shall be considered a part thereof.

PRICES.

We propose to furnish the property as specified herein for the sum of $2430.00 Dollars ($2430.00) to be paid at the Company's office shown herein, as follows:

TERMS.

$200.00 $400.00 cash with order,
Old Eng. 200

$500.00 upon installation, 30 days to install.

Balance July 15, 1920, $500.00 Nov. 15, 1920, $500.00 July 15, 1921, $530.00 after shipment.

All deferred payments are to be evidenced by negotiable notes payable to the order of this Company, dated and delivered as of the date of shipment and to bear interest from said date at the rate of 8% per cent per annum. The above payments represented by notes are to be secured by lien mdse.

This proposal is made upon the following conditions:

TITLE.

That the title and ownership of the property herein specified shall remain in this Company until final payment therefor has been made in full as above provided, and in the event that notes are taken at any time, representing deferred payments, or any balance that may be due, or in the event that any judgment is taken on account of all or any part of the purchase price, the title to such prop-

erty shall not pass until such notes, so given or extensions thereof, or such judgment taken, are fully paid in money and satisfied. This Company shall have the right to discount or transfer any of said notes, and the title or right of possession in and to said property shall pass thereby to the legal holder of said notes.

[12] You shall take all such legal steps as may be required by the laws of your state for the preservation of this Company's title as herein provided and in the event of default by you in making any of said payments when due as above provided, the full amount of the purchase price, shall at the election of this Company, become immediately due and payable, in which event this Company, or its .agents or representatives, shall have the right to take possession of said property wherever found, without process of law, and shall not be held liable for such seizure, and this Company may, at its election, upon written notice to you, deposited in the mails ten (10) days prior thereto, addressed to you at your last known address, sell said property or any part thereof, at public or private sale and at which sale, it shall be optional with this Company to bid for and purchase their property or any part thereof. This Company shall retain so much of the proceeds of such sale necessary to satisfy the balance remaining due, together with the cost of such removal and sale, and any excess shall be paid to you. Should the proceeds of such sale not cover the balance remaining due this Company, together with the

cost of removal and sale, you shall pay the deficiency to this Company forthwith after such sale. The said property shall be and remain strictly personal property and retain its character as such, no matter whether on permanent foundation, or in what manner affixed or attached to building or structure, or what may be the consequences of its being disturbed on such foundation, building or structure, or for what purpose the property may be used.

That the receipt of the property when delivered to you or to your agents shall constitute a waiver of all claims for damages by reason of any delay, and that you will make good to us any loss or damage to said property caused by fire or otherwise, from the time of delivery to you, as herein stated, until the said property is fully paid for, as provided herein.

In the event that it is necessary to employ an Attorney in the collection of any moneys due under this contract you agree to pay Attorney's fees and other expenses incurred in connection therewith.

[13] As a further consideration, you will pay us twenty per cent (20%) of the purchase price stated in this proposal as agreed liquidated damages in the event of your refusing to receive said property when delivered, or in the event of this proposal being countermanded by you after having been accepted by you.

It is expressly understood this proposal made in duplicate contains all agreements pertaining to property herein specified, there being no verbal

understanding whatsoever, and when signed by purchaser and approved by an Executive Officer or Local Manager of Fairbanks, Morse & Co. becomes a contract binding parties thereto.

All items of this proposal are contingent upon and subject to strikes, accidents or other causes beyond our control.

Respectfully submitted.

FAIRBANKS, MORSE & CO.

By A. J. POWELL.

The above proposal is hereby accepted this 25th day of Sept. 1919.

AUSTIN BROS.

c/o LEVI F. AUSTIN.

Signed in presence of:

_____.

Approved at Seattle, Wn.

FAIRBANKS, MORSE & CO.

By C. R. MILLER, Manager.

Filed with complaint.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. April 1st, 1921. W. H. Hare, Clerk. Edwd. E. Cleaver, Deputy.

[14] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

Bill of Particulars.

The plaintiffs, above named, responding to the demand of the defendants, for a bill of the particular items of the damages mentioned in the second cause of action in the complaint of the plaintiffs herein, and which constitute the special damages amounting to eighteen hundred dollars ($1800.00) prayed for in said complaint, herewith and herein submit the following statement of said particular items of damage.

Cost of labor and material used in construction of a transmission, hydro-electric power, line of one and a quarter miles, from the most contiguous existent power line to plaintiffs' premises, including ten poles, cross-arms for said poles, hardware

and insulators, one and a quarter miles of wire, and hauling and raising of poles, and digging of pole holes, and stringing wire and tieing in same and fitting poles with cross-arms	$ 355.25
One pump	600.00
Motor rent and repairs of motor	101.50
One 10-inch foot valve	90.00
One 8-inch elbow	20.00
One long radius 10-inch elbow	30.00
One 8-inch gate valve	64.00
One 10-inch long radius elbow	30.00
45 feet of 10-inch iron pipe	135.00
1 8x10 reducer	25.00
Cost of privilege of connecting with existent power line	80.00
Cost of hydro-electric power for balance of irrigating season from 1st of May, 1920, or thereabout to pump water to irrigate the land described in plaintiffs' complaint	350.00
Total	$1880.75

Dated this 3d day of June A. D. 1921.

EUGENE E. WAGER and
JAMES COLLINS LLOYD,
Attorneys for Plaintiffs.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. June 4th, 1921. W. H. Hare, Clerk.

[15] In the District Court of the United States, for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO, a Foreign Corporation,

Defendant.

Answer and Affirmative Defenses.

Comes now the defendant above named and without conceding or admitting the materiality or legal sufficiency of the allegations set forth in the first cause of action in the complaint herein, but reserving the right to raise said question upn the trial hereof, answers said first cause of action as follows:

1. Answering the first paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

2. Answering the second paragraph of said first cause of action, the defendant says that it has

no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

3. Answering the third paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

4. Answering the fourth paragraph of said first cause of action, the defendant admits each and every allegation therein contained.

5. Answering the fifth paragraph of said first cause of action, the defendant says that it has no knowledge or information [16] sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

6. Answering the sixth paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

7. Answering the seventh paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

8. Answering the eighth paragraph of said first cause of action, the defendant admits each and every allegation therein contained, except as modified in the manner hereinafter affirmatively pleaded.

9. Answering the ninth paragraph of said first cause of action the defendant admits each and every allegation therein contained.

10. Answering the tenth paragraph of said first cause of action, the defendant admits each and every allegation therein contained.

11. Answering the eleventh paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

12. Answering the twelfth paragraph of said first cause of action, the defendant denies each and every allegation therein contained.

13. Answering the thirteenth paragraph of said first cause of action, the defendant denies each and every allegation therein contained, except it admits that plaintiffs gave defendant notice of rescission of said contract upon the part of said plaintiff Austin Bros., and of said plaintiffs' demand for return of the said amount of money advanced to defendant upon said contract.

[17] 14. Answering the fourteenth paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

15. Answering the fifteenth paragraph of said first cause of action, the defendant denies each and every allegation therein contained, and specifically denies that plaintiffs have sustained dam-

age in the sum of $7,000.00 or any other sum whatsoever.

And without conceding or admitting the materiality or legal sufficiency of the allegations contained in the second cause of action set forth in the complaint herein, *but* reserving the right to raise said questions upon the trial thereof, defendant answers said second cause of action as follows:

1. Answering the first paragraph of said second cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

2. Answering the second paragraph of said second cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

3. Answering the third paragraph of said second cause of action the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

4. Answering the fourth paragraph of said second cause of action, the defendant admits each and every allegation therein contained.

5. Answering the fifth paragraph of said second cause of action, the defendant says that it has no knowledge or information sufficient [18] to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

6. Answering the sixth paragraph of said second cause of action the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

7. Answering the seventh paragraph of said second cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

8. Answering the eighth paragraph of said second cause of action, the defendant admits each and every allegation therein contained except as modified in the manner hereinafter pleaded affirmatively.

9. Answering the ninth paragraph of said second cause of action, the defendant admits each and every allegation therein contained.

10. Answering the tenth paragraph of said second cause of action the defendant admits each and every allegation therein contained.

11. Answering the eleventh paragraph of said second cause of action the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

12. Answering the twelfth paragraph of said second cause of action, the defendant denies each and every allegation therein contained.

13. Answering the thirteenth paragraph of said second cause of action the defendant denies each

and every allegation therein contained, except it admits that plaintiffs gave defendant notice of rescission of said contract upon the part of said plaintiffs, Austin Bros., and of said plaintiffs' demand for return of the said amount of money advanced to defendant upon said contract.

14. Answering the fourteenth paragraph of said second cause of action, the defendant says that it has no knowledge or information [19] sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

15. Answering the fifteenth paragraph of the second cause of action, the defendant denies each and every allegation therein contained.

16. Answering the sixteenth paragraph of said second cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

17. Answering the seventeenth paragraph of said second cause of action, the defendant denies each and every allegation therein contained, and specifically denies that plaintiffs have suffered damage in the sum of $1800.00, or any other sum whatsoever.

Further answering the complaint of the plaintiff and the causes of action therein contained, and by way of a first affirmative defense thereto, defendant alleges and states:

1. That on or about the 25th day of September, 1919, it submitted to plaintiff its general proposal

in printing, writing and figures for said pumping equipment described herein, and that the plaintiffs in writing on or about said date accepted said written and printed proposal, and thereafter said written and printed proposal as accepted by plaintiffs in writing, was approved by the Seattle Manager of defendant company, and a copy of said written and printed proposal as accepted by plaintiffs and defendant is hereto attached, marked Exhibit "A," and made a part of this answer.

2. That said written proposal among its several provisions contained the following clause:

> "All items of this proposal are contingent upon and subject to strikes, accidents or other causes beyond our control."

3. That defendant accepted said order from plaintiffs which [20] contained the clause above mentioned after it had been signed by plaintiffs; that at the time of the acceptance of said order and continuing until the early summer of the year 1920, there was a great shortage both of labor and material entering into the manufacture of engines and pumps throughout the United States, and defendant was unable to procure the necessary labor and material for the building of said pumps and engines; that by reason thereof manufacturers and sellers of such equipment were unable to make deliveries of their orders, which facts were at all times known to the plaintiffs; that between the date of said order and the 30th day of April, 1920, by reason of said shortage of labor and material defendant was unable to deliver the equipment pur-

chased as aforesaid to the said plaintiffs; that such shortage and conditions could not have been foreseen by defendant, and on account thereof it could not fill said order; that said circumstances preventing said defendant from performing its said contract were entirely beyond the control of defendant, and defendant was without fault on its part; that its said agreement with plaintiffs became impossible of performance and defendant was unable to make delivery of said pumping equipment in accordance with the provisions of its contract.

4. That the clause hereinbefore mentioned and contained in said contract was well known to plaintiffs at the time it was made, and said contract was made with reference thereto.

Further answering said complaint and the two causes of action therein contained, and by way of a second affirmative defense thereto, defendant states and alleges:

1. That on or about the 25th day of September, 1919, it submitted to plaintiffs, its general proposal in printing, writing and figures, for said pumping equipment described therein, and that the plaintiffs in writing on or about said date accepted said written [21] and printed proposal, and thereafter said written and printed proposal as accepted by plaintiffs in writing, was approved by the Seattle manager of defendant company, and a copy of said written and printed proposal as accepted by plaintiffs and defendant is hereto attached,

marked Exhibit "A," and made a part of this answer.

2. That as soon as defendant discovered it could not make delivery of the pumping equipment mentioned and described in said proposal and acceptance, it notified the plaintiffs thereof, and the plaintiffs agreed to the modification of said contract, so as to extend the time of delivery until defendant ascertained when such delivery could be made; that on the 30th day of March, 1920, the said plaintiffs arbitrarily canceled and rescinded said contract.

3. That on or about the 2d day of April, 1920, the defendant offered to furnish said plaintiffs with a temporary unit, consisting of engine and pump, and on the 9th day of April, 1920, it confirmed in writing the said offer to plaintiffs, stating it could furnish to plaintiffs a 25-H. P. Type "Y" oil engine, similar in every respect to the one purchased by them, which it had in stock in Seattle, together with a 4-inch pump that could handle about 550 gallons of water per minute, which it also had in stock in Seattle, to be used by plaintiffs as a temporary equipment until defendant could procure from another source, on thirty days delivery, a new pump similar to the one purchased; that said engine and pump were capable of furnishing all the water necessary for plaintiffs' use during the summer irrigation season of 1920; that defendant also asked plaintiffs to advise it by return mail whether or not its proposition would be accepted, and if it was, defendant would make every

effort to get the equipment ready in short order; that if said proposition had been accepted by plaintiffs, said pumping equipment in its entirety could have been installed and [22] ready for operation in not to exceed seven days from time of acceptance; that on or about the 13th day of April, 1920, the plaintiffs wrote defendant refusing to accept said offer, and on the 15th day of April, 1920, the defendant wired plaintiffs, confirming arrangement for temporary pumping unit and asking if it could ship engine and temporary pump from Seattle; that on the 17th day of April, 1920, defendant again wrote plaintiffs, stating it had the 25-H. P. engine and pump for a temporary installation in Seattle stock, and was holding this equipment until plaintiffs advised it definitely in the matter; that defendant also stated that the engine could be installed permanently, and that the only temporary part would be the pump, and that when the new pump arrived it could be substituted for the temporary pump installed; that on or about the 20th day of April, 1920, the plaintiffs wrote defendant, refusing to accept its proposition to put in a temporary pump and refusing to deal with it any further; that defendant again in writing on the 21st day of April, 1920, submitted to plaintiffs, a proposition to furnish engine and pump from Seattle, which would amply meet plaintiffs' needs until the permanent pump arrived, which offer was also refused by plaintiffs; that had said plaintiffs accepted the offers of defendant to furnish it, the temporary pumping equipment as

aforesaid, no damage would have been sustained by them.

4. That on or about the 30th day of April, 1920, the pumping equipment mentioned in said proposal and acceptance was delivered by defendant to plaintiffs at Hanford, Washington, and said plaintiffs refused to accept delivery of same; that if said equipment had been accepted it could have been installed and in operation within four days thereafter.

Further answering said complaint, and the two causes of action therein contained, and by way of a third affirmative defense [23] thereto, defendant states and alleges:

That any damage sustained by the plaintiffs as alleged in their complaint, was due to their failure to use ordinary endeavors to get another pumping equipment to meet their needs or to accept the several offers made by defendant to furnish them a temporary equipment to meet their needs; that there were plenty of engines and pumps in the markets of Seattle, Spokane, Yakima, Toppenish and Kennewick, all in the state of Washington, suitable for the needs of plaintiffs, which could have been procured by them if they had been willing to do so and which could have been procured by the defendant for plaintiffs, had they permitted it to do so.

Further answering said complaint and the two causes of action therein contained, and by way of a fourth affirmative defense thereto, the defendant states and alleges:

That the damages claimed by plaintiffs to be the result of the failure of the defendant to deliver the pumping equipment mentioned in the complaint herein, were not such damages as were within the contemplation of the parties at the time the contract was made, and they are too remote and speculative to be considered.

WHEREFORE, defendant prays that plaintiffs' complaint be dismissed and that it do have and recover its costs herein.

VAN DYKE & THOMAS,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

Josiah Thomas, being first duly sworn upon his oath, says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing answer and affirmative defenses and believes the same to be true, and affiant further says that said defendant is a nonresident of the State of Washington, wherein this suit is brought, and is a corporation duly organized under the laws of the State of Illinois, with its principal place of business in the city of Chicago, in said state, and affiant makes this verification for the reason that said defendant has no officer in the state of Washington, where this [24] action is brought, and it is a nonresident of said state.

JOSIAH THOMAS.

Subscribed and sworn to before me this 29th day of July, 1921.

LOUIS E. SHELA,

Notary Public in and for the State of Washington, Residing at Seattle.

Exhibit "A."

[25] FAIRBANKS, MORSE & CO.

(Incorporated)

GENERAL PROPOSAL.

Sept. 25, 1919.

To M—— Austin Bros., Purchaser.

Beverly, Wash.

We hereby propose to furnish and deliver F. O. B., cars at Seattle, Wash., or *on* car *fro* from factory provided the car can be made up, the following as per specifications below:

ITEMS.

1–25 Type "Y" Oil Engine, fitted with 40 x 10 F. C. Pulley, "Havana Style, and exhaust pipe,

1–8" A. H. Z. Y. B. split case pump fitted with 14" Diam. x 10" face crown pulley.

1–8 x 10 Dischg. Ell.

40 ft. 8" 6 Ply test special belt,

1 set foundation bolts for engine,

DELIVERY.

Shipment so delivery Dec. 1, 1919 will be made to be shipped to Austin Bros., at Haven, Wash., via Milwaukee.

Additional equipment may be listed on the back of this sheet under heading "Additional Equipment" and will then be furnished by us under this proposal.

GUARANTY.

The machinery herein specified is guaranteed by us to be well made, of good material and in a workmanlike manner. If any parts of said machinery fail through defect in workmanship or material within one year from date of shipment thereof, this Company will replace such defective parts, free of charge, f. o. b. cars our factory, but this Company will not be liable for repairs or alterations unless the same are made with our written consent and approval. This Company will not be liable for damages or delays caused by such defective material or workmanship, and it is agreed that its liability under all guarantees is expressly limited to the replacing of parts failing through defect in workmanship or material, free of charge f. o. b. its factory within the time and in the manner aforesaid. Parts claimed to be defective are to be returned to us at our option, transportation prepaid.

ADDITIONAL EQUIPMENT.

The following equipment is included in the purchase price of this proposal, and shall be considered a part thereof.

_____ _____

_____ _____

_____ _____

[26] PRICES.

We propose to furnish the property as specified herein for the sum of $2430.00 Dollars (2430) to be paid at the Company's office shown herein, as follows:

$200 $400.00 cash with order,
Old engine 200.
$500.00 upon installation, 30 days for installing,
Balance $ July 15, 1920, $500.00, Nov. 15, 1920, $500 July 15, 1921, $530.00 after shipment.

TERMS.

All deferred payments are to be evidenced by negotiable notes payable to the order of this Company, dated and delivered as of the date of shipment and to bear interest from said date at the rate of 8% per annum. The above payments represented by notes are to be secured by lien on mdse.

TITLE.

THIS PROPOSAL IS MADE UPON THE FOLLOWING CONDITIONS: That the title and ownership of the property herein specified shall remain in this Company until final payment therefore has been made in full as above provided, and in the event that notes are taken at any time, representing deferred payments, or any balance that may be due, or in the event that any judgment is taken on account of all or any part of the purchase price, the title to such property shall not pass until such notes, so given, or extensions thereof, or such judgment taken, are fully paid in money and satisfied. This Company shall have the right to discount or transfer any of said notes, and the title or right of possession in and to said property shall pass thereby to the legal holder of said notes.

You shall take all such legal steps as may be required by the laws of your state for the preservation of this Company's title as herein provided and in the event of default by you in making any of said payments when due as above provided, the full amount of the purchase price shall, at the election of this Company, become immediately due and payable, in which event this Company, or its agents or representatives, shall have the right to take possession of said property, wherever found without process of law, and shall not be liable for such seizure, and this Company may, at its election, upon written notice to you, deposited in the mails ten (10) days prior thereto, addressed to you at your last known address, sell said property or any part thereof, at public or private sale and at which sale, it shall be optional with this Company to bid for and purchase their property or any part thereof. This Company shall retain so much of the proceeds of such sale necessary to satisfy the balance remaining due, together with the cost of such removal and sale, and any excess shall be paid to you. Should the proceeds of such sale not cover the balance remaining due this Company, together with the cost of removal and sale, you shall pay the deficiency to this Company forthwith after such sale. The said property shall be and remain strictly personal property and retain its character as such, no matter whether on permanent foundation or in what manner affixed or attached to building or structure, or what may be the consequences of its

being disturbed on such foundation, building or structure, or for what purpose the property may be used.

That the receipt of the property when delivered to you or to your agents shall constitute a waiver of all claims for damages by reason of any delay, and that you will make good to us any loss or damage to said property caused by fire or otherwise, from the time of delivery to you, as herein stated, until the said property is fully paid for, as provided herein.

In the event that it is necessary to employ an Attorney in the collection of any moneys due under this contract [27] you agree to pay Attorney's fees and other expenses incurred in connection therewith.

As a further consideration, you will pay us twenty per cent (20%) of the purchase price stated in this proposal as agreed liquidated damages in the event of your refusing to receive said property when delivered, or in the event of this proposal being countermanded by you after having been accepted by you.

It is expressly understood this proposal made in duplicate contains all agreements pertaining to property herein specified, there being no verbal understanding whatsoever, and when signed by purchaser and approved by an Executive Officer or Local Manager of Fairbanks, Morse & Co., becomes a contract binding parties hereto.

All items of this proposal are contingent upon and subject to strikes, accidents or other causes beyond our control.

Respectfully submitted,

FAIRBANKS, MORSE & CO.

By A. J. POWELL.

The above proposal is hereby accepted this 25th day of Sept. 1919.

AUSTIN BROS.

By LEVI F. AUSTIN.

Signed in the presence of

_____

_____

Approved at Seattle, Wn.

FAIRBANKS, MORSE & CO.,

By C. R. MILLER,

Manager.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 10, 1921. Wm. H. Hare, Clerk. Edwd. E. Cleaver, Deputy.

[28] In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN as TRUSTEE,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendants.

Reply.

The plaintiffs, reserving the right to raise, upon the trial of the above-entitled cause, the question of the materiality and legal sufficiency of the allegations contained in and constituting the first affirmative defense set up in defendants' answer herein, now reply to the allegations contained in said affirmative defense as follows:

I.

Replying to the first paragraph of first affirmative defense, plaintiffs deny that the paper attached to said defendants' answer herein, as served upon plaintiffs, and marked Exhibit "A," is a copy of the written and printed proposal as ac-

cepted by plaintiffs and defendants on the 25th day of September, 1919.

II.

Replying to the second paragraph of said first affirmative defense, plaintiffs deny each and every allegation in said paragraph contained.

III.

Replying to the third paragraph of said first affirmative defense, plaintiffs deny each and every allegation, and all of the allegations in said third paragraph contained.

IV.

Replying to the fourth paragraph of said first affirmative defense plaintiffs deny each and every allegation in said fourth paragraph contained.

[29] Plaintiffs, reserving the right to raise upon the trial, of the above-entitled cause, the question of the materiality and legal sufficiency of the allegations contained in and constituting the second affirmative defense, set up in defendants' answer herein, reply to the allegations contained in said second affirmative defense as follows:

I.

Replying to the first paragraph of said second affirmative defense plaintiffs deny that the paper attached to defendants' answer herein, as served upon plaintiffs, and marked Exhibit "A," is a copy of the written and printed proposal as accepted by plaintiffs and defendants on the 25th day of September, 1919.

II.

Replying to the second paragraph of said second affirmative defense plaintiffs deny each and every allegation in said second paragraph contained except the allegation that on the 30th day of March, 1920, the plaintiffs rescinded said contract.

III.

Replying to the third paragraph of said second affirmative defense plaintiffs deny each and every allegation, and all of the allegations, in said paragraph contained except as hereinafter specifically admitted.

IV.

Plaintiffs admit, that under date of the 9th of April, 1920, the defendants wrote plaintiffs acknowledging receipt of plaintiffs' letter of 30th of March, 1920, rescinding said contract, the subject of this action, and admitting defendants' failure and inability to fulfill said contract, or to substitute any pumping equipment satisfactory to plaintiffs, or adequate to furnish water to irrigate plaintiffs' lands, within the time necessary to save plaintiff's crops, or to relieve the situation in which said defendants had placed plaintiffs by their said failure, but proposing to temporarily furnish a twenty-five horse-power engine, and a four-inch pump to be shipped thereafter from Seattle.

[30] Plaintiffs also admit that, under date of 17th of April, 1920, defendants wrote plaintiffs stating that they, defendants, had on the 15th of April, 1920, telegraphed to plaintiffs a renewal

of their said proposal of the 9th of April, 1920, and requesting an answer thereto. Plaintiffs also admit that defendants wrote plaintiffs on the 21st of April, 1920, renewing their proposal of the 9th of April, 1920, to install an engine and a four-inch pump, and that plaintiffs replied to said letter of the 21st of April, 1920, on the 26th of April, 1920, stating that defendants well knew, that, considering the depth of plaintiffs' well and the consequent lift of water and the acreage of land to be irrigated by the proposed plant contracted for with defendants, a four-inch pump would be totally inadequate and of little or no service or value in the circumstances named.

V.

Replying to the fourth paragraph of said second affirmative defense plaintiffs deny each and every allegation in said fourth paragraph contained.

Plaintiffs, reserving the right to raise upon the trial, of the above-entitled cause, the question of the materiality and legal sufficiency of the allegations contained in and constituting the third affirmative defense, set up in defendants' answer herein, reply to the allegations contained in said third affirmative defense as follows:

I.

Replying to the third affirmative defense, set up by said defendants in their said answer, and to the allegations in said third affirmative defense contained, plaintiffs deny each and every allegation, and all of the allegations, in said third affirmative defense contained.

The plaintiffs, reserving the right to raise, upon the trial of the above-entitled cause, the question of the materiality and legal sufficiency of the allegations contained in and constituting the fourth affirmative defense set up in defendants' answer herein, now reply to the allegations contained in said fourth affirmative defense as follows:

[31] I.

Replying to the fourth affirmative defense, set up by said defendants, in their said answer in the above-entitled case, and to the allegations in said fourth affirmative defense contained, plaintiffs deny each and every allegation, and all of the allegations in said fourth affirmative defense contained.

And further replying to said four affirmative defenses, set up in defendants' said answer in this action, and by way of new and affirmative matter, plaintiffs allege:

I.

That when defendants entered into the contract, the subject of this action referred to in said affirmative defenses, a true and correct copy of which said contract is annexed to plaintiffs' complaint in this action and marked Plaintiffs' Exhibit "A" the said defendants had a thorough, complete and comprehensive knowledge and understanding of the conditions, existent and prospective of the labor market obtaining throughout the United States and of the general industrial, economic, and transportation situation existing, and prospective, throughout the United States, and

entered into said contract, and induced plaintiffs to enter into said contract, at said time, when defendants well knew and thoroughly realized all of said conditions obtaining as to labor, and industry and transportation in the United States, and the defendants had all of said conditions in contemplation, and assumed all risks incident to said conditions, when they entered into said contract.

II.

That it was well known by defendants, and by their agents and servants, at the time said contract, the subject of this action, was made and entered into, and at all times in this reply mentioned, that plaintiffs had at the time they made and entered into said contract, and in reliance on the fulfillment thereof by the defendants, abandoned all means of pumping water, for irrigation of their land, more fully described in the complaint herein, which they had previously used, and had sold their former pumping equipment to defendants, as a part of the purchase price of the new equipment, contracted [32] from defendants, and that owing to changes in their irrigation system, to accommodate said new equipment, and enlargement of their acreage of irrigable land and equipment of the character and capacity so contracted, as aforesaid, was indispensably necessary to properly irrigate said land, and save the crops thereon during the spring and summer of 1920, and that failure to have said equipment installed and in operation by the beginning of the irrigating

season, of 1920, in the section of country in which plaintiffs' lands were situated, would subject plaintiffs to the total or partial loss of their said crops; and such damage as plaintiffs might suffer in such contingency, and defendants' liability therefor were in the contemplation of the parties to said contract at the time said contract was made and at all times thereafter.

III.

That the defendants well knew, and it was in the contemplation of all parties to the said contract, at the time of entering into said contract, that unless said machinery was supplied according to the terms of said contract, or at least in time to be installed on plaintiffs' premises by the beginning of the irrigating season of 1920, in the section of the country in which plaintiffs' lands are situate, or in the event that it could not be so furnished by defendants that plaintiffs had timely notice of defendants' inability to fulfill their said contract, so that plaintiffs could seasonably obtain and install other adequate machinery, that the loss of plaintiffs' crops would be the inevitable correlary, and that defendants would be answerable in damages therefor.

IV.

That, well knowing all of the facts alleged in the three preceding paragraphs hereof, and that said machinery had not been shipped, and in order to mislead and deceive the plaintiffs, the defendants, their agents, and servants wrongfully, falsely, and fraudulently, represented to plaintiffs that said

machinery had been shipped late in the month of December, 1919, and plaintiffs believed said false representations and relied thereon and defendants continued to leave plaintiffs in that belief, and in that false sense of [33] security, and to deny plaintiffs any further information in respect of said machinery, or to reply to plaintiffs' many inquiries regarding said machinery, or the shipment or status thereof, until the 9th of April, 1920, and until after plaintiffs had previously rescinded said contract on the 30th day of March, 1920.

WHEREFORE plaintiffs pray that they be granted the relief demanded in their complaint herein.

EUGENE E. WAGER and
JAMES COLLINS LLOYD,
Attorneys for Plaintiffs.

State of Washington,
County of Kittitas,—ss.

James Collins Lloyd, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiffs in the above-entitled cause, and that he has read the foregoing *replication;* knows the contents thereof and believes the same to be true.

That he makes this verification for and on behalf of the plaintiffs in said cause for the reason that none of said plaintiffs are now within this county or capable of making said verification.

JAMES COLLINS LLOYD.

Subscribed and sworn to before me this 9th day of August, 1921.

BERNICE N. CHADWICK,
Notary Public, Residing at Ellensburg, Wn.

[Endorsed]: Filed in the U. S. District Court Eastern District of Washington. August 23d, 1921. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

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[34] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. ——.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

Notice of Motion for Leave to Amend Complaint.

To the Above-named Defendant and to Messrs. Van Dyke & Thomas, Its Attorneys of Record:

You, and each of you, will please take notice that plaintiffs will on the 10th day of October, 1921, at ten o'clock in the morning, or as soon

thereafter as counsel can be heard, call up for hearing before the said Honorable Court, in open court at Yakima, Washington, their motion for leave to amend plaintiffs' complaint in this action, a copy of which motion and proposed amendments is herewith served upon you.

Dated this the 1st day of October, A. D. 1921.

EUGENE E. WAGER and
JAMES COLLINS LLOYD,
Attorneys for Plaintiffs.

[Endorsed]: Filed in the U. S. District Court Eastern District of Washington. Oct. 10th, 1921. W. H. Hare, Clerk. Edwd. E. Cleaver, Deputy.

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[35] In the District Court of the United States for the Eastern District of Washington, Southern Division.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

Motion for Leave to Amend Complaint.

Come now the plaintiffs in the above-entitled

cause, appearing by their attorneys Eugene E. Wager and James Collins Lloyd, and respectfully move this Honorable Court for leave to amend plaintiffs' complaint herein in the manner following, to wit:

By inserting, immediately after the tenth paragraph, and on the third page of said complaint, and immediately after the tenth paragraph, and on the seventh page of said complaint, a new paragraph, denominated paragraph ten and a half in the words and figures following, to wit:

X½.

"That the said machinery, contracted for as aforesaid, was purchased by the said plaintiffs to be used by them in pumping water from a newly constructed well on their said land, during the irrigating season of 1920, and subsequent years, to irrigate all of the land hereinbefore described, which was then under cultivation, the said well being supplied by a direct, continuous, and abundant and sufficient flow of water from the Columbia River, to which it was in close proximity, and the said plaintiffs relying upon the fulfillment of said contract by defendants, had from the time of entering into said contract, and by reason thereof, abandoned, and deprived themselves of all other means of irrigating said land, all of which facts were well known to defendant, their agents, and servants at the time said contract was made and at all times thereafter."

[36] And plaintiffs further move this Honorable Court for leave to amend said complaint, by

inserting immediately after the word "paid" in the fifth line of the fifteenth paragraph, on page 5, of said complaint the following allegation:

"The said damages consisting, first, in the loss of 250 tons of alfalfa hay, of the value of $5000.00 (Five Thousand Dollars), which would have grown and been harvested on said land, in excess of the quantity of alfalfa that did grow and was harvested thereon, during the crop year of 1920, if said defendants had fulfilled their said contract, so that plaintiffs could have pumped water to irrigate said land at and during the time they were deprived of the means of pumping water, by reason of the failure of defendants to fulfill the said contract, but which alfalfa was lost to plaintiffs by reason of plaintiff not being able to pump any water, to irrigate said land, for about six weeks or more after the time when said land should have begun to be irrigated, because of defendant's failure to furnish said machinery as agreed in said contract or in time to enable plaintiffs to begin pumping water aforesaid in time to save said crop. And secondly, by the total destruction of the alfalfa plant, and the roots thereof, on seven acres of said land, and permanent injury to the alfalfa plant on thirty-five additional acres of said land, by reason of the deprivation of the means of pumping water, to properly irrigate said land, as aforesaid, because of the failure of defendants to fulfill said contract; the said last-mentioned

injury to said forty-two acres of land causing plaintiffs additional damage in the sum of $2000.00 (Two Thousand Dollars)."

This motion is based upon the files and records of this court in this cause and the annexed affidavit.

Dated this first day of October, 1921.

EUGENE E. WAGER and
JAMES COLLINS LLOYD,
Attorneys for Plaintiffs.

[Endorsed]: Filed in the U. S. District Court Eastern District of Washington. Oct. 10th, 1921. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

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[37] In the District Court of the United States for the Eastern District of Washington, Southern Division.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

Affidavit in Support of Amendment to Complaint.

State of Washington,
County of Kittitas,—ss.

James Collins Lloyd, being first duly sworn, deposes and says:

That he is one of the attorneys for plaintiffs in the above-entitled cause and that plaintiffs have, herein, a meritorious cause of action, and that the amendments to plaintiffs' complaint, moved for by plaintiffs, are necessary to properly and legally state plaintiffs' cause of action and are made in good faith and are not for purpose of delay.

The *the* allegations contained in said amendments were omitted from the complaint by oversight and inadvertence and that defendant can not be delayed, surprised or prejudiced by said amendments or either of them.

JAMES COLLINS LLOYD.

Taken, subscribed and sworn to before me this 1st day of October, A. D. 1921.

[Seal] BERNICE N. CHADWICK,
Notary Public in and for the State of Washington, Residing at Ellensburg.

[38] In the District Court of the United States for the Eastern District of Washington, Southern Division.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendants.

Affidavit of Service of Motion for Leave to Amend Complaint.

State of Washington,
County of Kittitas,—ss.

James Collins Lloyd, being first duly sworn upon oath, deposes and says: That he is one of the attorneys for the plaintiffs in the above-entitled cause, and that he served the motion for leave to amend the complaint and also the notice of motion and affidavit attached thereto upon the defendants by delivering to and leaving with them a true and correct copy of said motion for leave to amend notice of motion and affidavit on Josiah Thomas, one of the attorneys for the said defendants, personally in King County, State of Washington, on the 3d day of October, A. D. 1921, between the hours of

nine o'clock in the morning and four o'clock in the afternoon by delivering to and leaving with said Josiah Thomas a true and correct copy of each of said papers.

JAMES COLLINS LLOYD.

Subscribed and sworn to before me this 5th day of October, 1921.

[Seal] BERNICE N. CHADWICK,
Notary Public, Residing at Ellensburg, Wn.

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[39] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 4542.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

Bill of Exceptions.

This was an action at law to recover both general and special damages for failure to deliver a certain pumping equipment within the time re-

quired by the provisions of a writtent contract between plaintiffs and defendant.

This case came on duly and regularly for hearing before the Honorable F. H. Rudkin, Judge, and before a jury, in the above-entitled court, at Yakima, Washington, on October 11, 1921, at ten o'clock A. M.

The plaintiffs were represented by their attorneys and counsel, Messrs. E. E. Wager and J. C. Lloyd, of Ellensburg, Washington. The defendant was represented by its attorneys, Mr. J. D. Campbell, of Spokane, Washington, and Mr. Josiah Thomas, of the firm of Van Dyke & Thomas, of Seattle, Washington.

Thereupon the following proceedings were had:

[40] Mr. WAGER.—May it please your Honor, there is a motion for leave to amend the complaint and we don't know whether the defendant will resist it or not.

The COURT.—I have read the proposed amendment.

Mr. THOMAS.—May it please the Court, this amendment was served upon us about eight days ago, and this case has been set for some time. It is somewhat late, and as I understand it, counsel for the plaintiffs have obtained an order for shortening the time of service for this proposed amendment. If the amendment is to be allowed, we want to demand that the amendment be made more definite and certain so as to conform with the general rule of damages in cases of this character. Your Honor will note that in addition they desire to

make on page 5 of the complaint, in which they change their first cause of action from general damages to special damages, they say that said damages consisted, first, in the loss of two hundred and fifty ton of alfalfa hay of the value of five thousand dollars, which would have grown on said land, etc. If this amendment is to be allowed, there should be a deduction made for producing and harvesting and marketing and irrigating this particular alfalfa.

The COURT.—Oh, yes, these deductions would be made in the instructions of the Court, the measure of damages there is not the correct one.

Mr. THOMAS.—They should specify the loss of profits they have sustained so we could check them off, the amount should be made definite and certain in that respect. Furthermore, in the last paragraph [41] of this proposed amendment they allege that the seven acres of land was totally destroyed, they also allege permanent injury to thirty-five acres and lump the whole sum together at two thousand dollars.

The COURT.—How do they claim the land was permanently destroyed, from want of water? It had been in that same condition for all time.

Mr. THOMAS.—(Reading:) "And secondly by the total destruction of the alfalfa plant and the roots thereof on seven acres of said land and permanent injury to the alfalfa plant on thirty-five additional acres of land by reason of the deprivation of the means of pumping water to properly irrigate said land as aforesaid, because of the

failure of defendant to fulfill said contract, the said last mentioned injury to said forty-two acres of land causing plaintiffs additional damage in the sum of two thousand dollars."

We believe we should be notified so that we would know what we are expected to meet in response to the issues in this case.

Mr. LLOYD.—May it please your Honor, the damages to the crops growing on the forty-two acres of land is alleged in this way, and secondly by the total destruction of the alfalfa plant and the roots thereof on seven acres of said land and permanent injury to the alfalfa plant on thirty-five additional acres of said land by reason of the deprivation of the means of pumping water to properly irrigate said land, etc. We don't allege the land is destroyed, we allege the alfalfa plants and the roots.

Mr. THOMAS.—We want to raise the question at this time that the failure of the defendant to deliver this pumping plant was not the [42] proximate cause for the loss of these crops and subsequent loss of the profits to the plaintiffs in this case,—that was a secondary result. If your Honor wants to hear argument on that proposition we are ready to go ahead, if not, we will take it up later.

The COURT.—That situation will arise during the trial.

Mr. THOMAS.—We want to present our objections at this time, if the Court please.

The COURT.—I will allow the amendment and will limit recovery to the property rights in my charge to the jury and proceed with the trial, Gentlemen.

Mr. THOMAS.—Your Honor will grant us an exception to the Court's ruling.

The COURT.—Yes.

Thereupon the following testimony was taken in said case:

Testimony of Levi Austin, for Plaintiffs.

LEVI AUSTIN, produced as a witness on behalf of the plaintiffs, after being duly sworn, on direct examination, testified as follows:

My name is Levi Austin. In 1919 I was engaged in the business of farming, in conjunction or association with my brother, Jay R. Austin, as we were doing business as Austin Bros. We resided about eleven miles West of White Bluffs, in Section 4 Township 13 North, Range 25, Benton County; this is the land described in the complaint. We were engaged in general stock raising, and general farming,—mostly cultivation of alfalfa. (It was admitted by counsel for defendant that if a certain witness were present she would testify that a part of the land [43] described in the complaint was held in trust by her for the plaintiffs.)

My brother and I own sixty-eight acres of deeded land and eighty acres under lease. In 1919 there was about thirty-eight acres of alfalfa on the deeded land and on the leased land there was about

(Testimony of Levi Austin.)

twenty acres, all seeded alfalfa from the year before, and about fifteen acres that were seeded that year in the fall.

Mr. THOMAS.—We want to object to the introduction of any testimony as to damages for any loss of crops, because under the issues of this case it is not a proper element of damages, going not to proximate cause but secondary cause, and we would like to have an objection to all that testimony.

The COURT.—Counsel has not reached that subject. Your objection is overruled for the present.

Mr. THOMAS.—Exception.

This is the lease we had for the eighty acres in question. (Lease offered in evidence and marked Plaintiffs' Exhibit "A.") It was impossible to raise anything on this land, even rye, without irrigation. We planted rye several years, but had no success with that. It is susceptible of raising crops when properly irrigated. In September, 1921, we entered into a contract with the defendant, Fairbanks, Morse & Co.

(Contract offered in evidence and received as Plaintiffs' Exhibit "B.")

Under the contract they delivered to us one article, a belt. We did not use it, it is still there. It was delivered at the station of Haven, where the rest of the machinery was supposed [44] to be delivered. Haven, Washington, is the nearest railroad station to our place. It is on the Milwaukee railroad, about two and one-half miles away.

(Testimony of Levi Austin.)

Mr. THOMAS.—Attorney for Defendant, said: For the purpose of shortening the testimony we will admit that contract was made and entered into and that the contract was not completed on or before March 31, 1920, and the only question, it seems to me, is the question of damages.

The COURT.—That is the date on which plaintiffs abrogated the contract.

Mr. WAGER.—On the 30th of March.

The COURT.—Well, with that understanding the only question is damages.

Mr. WAGER.—They alleged that they didn't deliver it, intended to deliver it and didn't deliver it because plaintiffs extended the time from time to time, as I understand.

The COURT.—That is a matter of defense, however.

Mr. WAGER.—Then I understand they admit the machinery was not delivered.

The COURT.—Prior to March 30, 1920.

Mr. THOMAS.—The machinery was not delivered prior to March 30, 1920, after the contract was rescinded that time, and the only question is the question of damages, your Honor.

The WITNESS, continuing, said: We had other means or sources of irrigating our lands in 1919, that is, we completed the well that season and used it that [45] season. We had a 15-horsepower engine of the same type that we ordered, connected with a 5″ pump. The water was pumped from a new well we used for the season of 1919.

(Testimony of Levi Austin.)

In the year 1920 we had no means of irrigating these lands. We contemplated and planned on using this machinery that we had ordered and we were given to understand that that machinery would be delivered in plenty of time and we wrote a number of letters to the Company asking for information in regard to it, and these letters were not answered. We depended on getting this plant and we took out the old plant. The old plant was not satisfactory at all, in fact, in 1919, we lost about all the crop on account of the old plant. Our lands were partly irrigated in 1920. We were compelled to put in another outfit, one we picked up at a different place,—pump one place and motor another place, and we started irrigating about the 20th of May. We got over our lands between the 20th day of June and the 1st of July. It took us about four weeks to go over the place. We used an 8″ pump, practically the same sized pump we had ordered from Fairbanks, Morse. We happened to get this pump from a man down the river about fifteen miles, we had it connected to a 15-horsepower motor. We arranged for electric power from Von Herberg paying him $800.00 for the privilege of connecting on his line, then we had to string a line out from his line. Von Herberg has a ranch next to us, he is a moving-picture man. This machinery has been used ever since. We have not been able to purchase any other machinery. We were so badly damaged we did not have any crop whatever that year, and we

(Testimony of Levi Austin.)

have not been able to get an outfit that we wanted, and we have had to use temporary machinery we put in there, that machinery is not satisfactory. Most of it is in use, some is not. We have not been able to improve much, we are planning to change as soon as we can. [46] We have practically the same equipment in that we put in temporarily because we have not been able to make the change. The upper tract of our land, the thirty-five acres, was in alfalfa. It was practically all old seeding, that is, it was over three years old. A temporary plant that we purchased was all right after we got started and was effective and sufficient for the irrigation of our land in the year 1920. We got started the 20th day of May. In that section of the country it is necessary to begin irrigating April 1st. We didn't begin until May 20. About the 25th or 26th of March I came over to Yakima to see if there would be any possible chance of getting an outfit, and machinery was so scarce, and I went to A. B. Fossein & Co. and they informed me they had a pump that would answer our purpose down below us and that we could probably get us a 20-horsepower motor to go with that pump. I told them the position that we were in and that we would have to get this equipment at once if we should need it. I did not order it at that time. I just came over to see if I could get it or not, and returned home, and I wrote Fairbanks, Morse & Co. canceling the contract and I notified Eck Baughn that he could proceed to get the machinery

(Testimony of Levi Austin.)

for us. I wrote him at Yakima April 2d, he probably got it the 4th or 5th of April. We got an 8" pump and managed to rent an old motor there in the community, 15 H. P. motor with head on. It was greatly overloaded but answered the purpose. It was delivered right away, in probably a week or ten days. We did not proceed to immediately install it because Fairbanks, Morse & Co.'s agent was out right after we wrote to them telling them we rescinded the contract and they sent a man out the 2d of April and he told us he would probably be able to get our equipment and wanted to know what we were doing, he would either phone us or telegraph us, and [47] we waited those two days, we didn't promise him to do that, we didn't depend on them. That occasioned several days delay. We installed the pumping plant as quick as we could get it on the place. After we got the pump I think it took us ten days to install the pump. We had to get the motor and we had to have parts made to fit the motor, direct motor to the pump, and we had to have the base arranged and other parts which occasioned more or less loss of time. We worked on the installation with assistance from the time received until installed and had it completed about the 15th day of May. We started operating it the 20th of May. At this time the alfalfa on the thirty-five acres of the old seeding was all dried out, it was all yellow and powdery. It all looked the same on the upper and lower ground. We started irrigating the new

(Testimony of Levi Austin.)

land first, we knew the seeding died before we started to irrigate the new land, first on the low land. It takes about two weeks on the lower land. We got that wet and then we found that some of the new seeding was killed, so we immediately reseeded that before turning the water on the hill because the ground was already wet. That caused us two or three days' delay getting on the upper land. It takes about two weeks on the upper land and about four weeks to get over the entire place. We had between fifty and sixty acres in cultivation at that time which we irrigated. We had seeded about 15 acres additional land in the fall of 1919. In the spring of 1920 our total acreage in cultivation was between fifty and sixty acres. The water ran continuously on to this land during the entire irrigation season after we got started.

From the thirty-five acres in the season of 1920 we got about twenty acres of hay. Our average, I think, for previous years on the 35 acres had been about five tons. We had not had ample irrigation for that land. That was one reason we were making [48] the change. Between six to ten tons to the acre is about the average yield in that country. We raised only 20 tons on the 35 acres. On the lower tract near the river we raised about 60 tons. That was about 25 acres, between 25 and 30. From 6 to 8 tons is the ordinary average yield of that land if properly irrigated. The effect of soil in that part of the country if the irrigation of it is delayed from April 1st to May 15th or 20th

(Testimony of Levi Austin.)

is to kill part of the roots, to weaken the stand of alfalfa and to destroy the first cutting. Standing alfalfa for the entire season it does not kill, but on some ground, take gravelly soil, that bakes; it will kill alfalfa on that. The effect on that alfalfa for lack of irrigation in 1920 was about seven acres of the new seeding was killed, when we irrigated it the new alfalfa did not come up at all, of course, and when we irrigated the lower land first, when we got on the high land on the other 25 acre place it was up in June and that land was gravel and had poorer soil than down below. This land of ours is adjacent to the Columbia River, it is practically a quarter of a mile from the low water line. We didn't get any first cutting at all in 1920, had a stand there so we only got a part of a crop. We got about 20 tons of hay from the 35 acres on the old seeding. We got between 50 and 65 off of but 18 acres. The effect of lack of water on the roots of the alfalfa grown on the 35 acres was that it killed a great many of the roots, it thinned the stand while we were irrigating in 1920, the first cutting came up scraggly and we only cut it twice, the second cutting was all grass and weeds, well, practically worthless. We ploughed about 15 acres since and left about 12 acres go entirely. We irrigated 10 acres this year. The alfalfa roots on this 25 acres were destroyed to such an extent as to make it unprofitable without reseeding. When you count [49] the cost of irrigation you cannot afford to irrigate on that

(Testimony of Levi Austin.)

kind of a stand. Practically ⅔ or ¾ of the roots of the alfalfa were destroyed. We reseeded 12 acres. In 1919 about 35 acres was in good condition, as nice a stand as you could ask for. The roots were injured on the 7 acres, of course, the entire field was injured, so we did not get as much hay as we should have got. Of course that would leave about 18 acres that we irrigated first, began irrigating about the 15th of May, that was injured very little, we got two cuttings off it. There was 42 acres with injured roots. We would have got at least 5 tons to the acre on the new seeding that was a year old had water been supplied on April 1st, 1920, and during the irrigation season of that year upon our 60 acres. We got 20 tons off 35 acres. That would make about 155 tons less than we would have received if properly irrigated on 35 acres. From the remaining acres that water had been supplied the 1st of April and during the season of 1920 we would have got close to 100 tons on the field that was not killed, and on the other we cut about 20 tons. We would have cut about 250 tons more on this land in 1920 if we had begun irrigation in April and continued during the season than we did get. We estimate the amount we lost from lack of irrigation and of irrigation facilities from April first and during the season of 250 tons of alfalfa. We sell practically all our hay loose, but we were intending that year to bale our first and second cutting, because that was the year after the hard winter and the hay was cleaned

(Testimony of Levi Austin.)

up. We had calls and sold practically all our hay for $18 and $20; that would make $14 less the cost of producing during 1920. It cost us about $5 to produce it in 1920. It cost us about $6 per ton to prepare a crop, baling and delivery and all. The cost of producing it in the stack would be about $3. That includes [50] the cost of pumping and everything else. The market price of hay in 1920 was about $24 per ton. I do not know that $6 would be correct for producing it and delivery on the cars that year, because we had to pay more for labor, it would have cost us a great deal more than $6, probably $2 more, $8.00. We have had no experience whatever with baling, we have not baled any of our hay. To reseed 42 acres of land in alfalfa would cost about $25 an acre, $7 an acre for ploughing in 1920 and I think we paid $40 per hundred for alfalfa seed and we sowed 20 lbs. The spring toothing and leveling and ditching and the other works amounting to $7 or $8 more. It amounted to between $20 and $25 an acre. I am farming this section of land and raising alfalfa and know the value of land there, with and without alfalfa on it. Because of withholding water from April 1st until the middle of May on this 42 acres of land, it means it would have to be reseeded and that means the loss of the value of one year's crop, as you receive no return the first year. The whole amount of damage would be at least $50 per acre for 43 acres.

(Testimony of Levi Austin.)

Mr. Powell, the traveling agent of the defendant, and Mr. Zane the local agent at Hanford, came to our ranch relative to buying this pumping plant. Mr. Powell's name appears on the contract, which is the first proposal we had. He was on or over our land prior to the execution of the contract and I went over the problem of irrigation with him.

Q. What was said to him relative to the purpose for which you wanted this plant?

Mr. THOMAS.—We object to this testimony on the ground that the contract speaks for itself, and merges all prior contemporaneous agreements all merged in the written contract.

[51] The COURT.—My understanding is you can always show execution of the written contract and it is not to bar you proving that fact.

Objection overruled, answer the question.

A. Yes, we went into details of the plant, that it was not satisfactory for even the acreage we had in then and we wanted to put in more acreage and we went into details as to the different lifts and the amount of water required and he proposed this 25-horsepower outfit connected to an 8″ pump would be exactly what we would want for this condition and the amount of water.

Q. Did the agent go with you over this land at the time you had this conversation? A. Yes.

Q. Did you or did you not make known to the agent of the defendant the full purpose?

Mr. THOMAS.—Objected to as the question is leading.

(Testimony of Levi Austin.)

The COURT.—You can ask him what the agent said in regard to it.

A. Yes, we told him our problem there for irrigation and at this time the outfit we had there was not satisfactory, we were not getting enough water and we told him that we must make a change of some kind and asked what he would recommend to fit our purpose and he proposed that we take at least a 25-horsepower engine and connect it to this 8″ pump and later on if we cared to put in a larger pump this 25-horsepower outfit would furnish the power. We told him at that time it would be necessary to have the outfit delivered in time account of the water in the spring, well he assured us if we would place our order at that time there would be no question about the delivery of the machinery.

[52] Q. Was anything said further by you as to the time necessary for the delivery?

A. Nothing further that would be delivered about the first of December.

Q. Why was it to be delivered by the first of December?

A. Well, he had to install the engine and machinery there and it takes more or less time, we thought we would install that during the winter so in our busy season we would have it ready for irrigation next year.

Q. Was anything said by the agent as to the time the land there should be irrigated there that season?

(Testimony of Levi Austin.)

The COURT.—What was said?

A. We discussed that point and it was understood we were to begin irrigation about the first of April. In going into the contract for the machinery to be delivered the 8th of December it would give us plenty of time to have the outfit installed and begin pumping by the first of April, that was understood between us and the agent.

Q. Did you fix any definite date on which you were to have this pumping plant in operation to irrigate your property for 1920? A. Yes.

Q. What was the date fixed?

A. April the first.

On cross-examination, LEVI AUSTIN testified as follows:

My occupation is farming. I teach school at present. I began teaching in September. I had taught before last September, I have taught four years altogether. I have been engaged from the time I was eight or nine years old until sixteen and then from 1917 until 1921 in alfalfa raising. Up to the time I was sixteen I raised alfalfa in Nebraska, Keith County. We raised [53] alfalfa there partly by irrigation.

Under lease we have the North ½ of the Northwest ¼—80 acres. Between that and the river there is a tract of land that is in alfalfa. It was owned by Wagner, possibly 10 or 12 acres that is in alfalfa. We have irrigated part of this leased land from a well on Mr. Wagner's place. Mr.

(Testimony of Levi Austin.)

Wagner was interested with us in the alfalfa on the school land. I think our arrangement with him was terminated some time in March, 1920. Wagner was irrigating about 10 acres of alfalfa from that well; that well came in about the first of May of each year. When he got the water on there May first I think he raised three crops every year. The year we irrigated that alfalfa on the leased land I do not think we got water on there before May first of 1919, we raised three crops that year. We raised three crops on a part of 35 acres above here that year, also with water obtained on May 1st.

We have about 20 tons of hay left from 1920. The winter of 1920 was an open one, a mild winter. Our market for hay up in that country is from the sheep men and farmers around there. I could say that after April 4th we did not intend to put in a gas engine at all.

On redirect examination, Mr. LEVI AUSTIN testified as follows:

Q. You had not at the time you talked to Mr. Zane, the agent of the defendant here, cancelled your contract with the company?

A. No, not at any time.

Q. Who was Zane?

A. He was the local agent of Fairbanks, Morse & Co. at Hanford.

Q. Where did he reside? A. Hanford.

Q. How long had he been there?

[54] A. Five or six years.

(Testimony of Levi Austin.)

Q. Had he been engaged as agent selling engines, etc. of the Fairbanks, Morse & Co. for a number of years in that country? A. Yes.

Mr. THOMAS.—I object to this line of testimony so far as proving agency is concerned as immaterial and incompetent.

A. That was his statement and Mr. Powell's statement that he had taken the agency.

The COURT.—He says Mr. Powell made some statement, Mr. Powell is admitted as agent.

Mr. WAGER.—If he was selling this equipment, the same kind for this defendant in that country for a number of years, I think that establishes agency.

Letters marked Defendant's Exhibits 1 and 2, and Plaintiff's Exhibit "C" were admitted in evidence in the examination of said witness.

Testimony of Jay Austin, for Plaintiffs.

JAY AUSTIN, produced as a witness on behalf of the plaintiffs, having been duly sworn, on direct examination testified as follows:

I am a member of the partnership of Austin Bros., and reside upon the land mentioned in the complaint here in 1919 and 1920. We still own it. I am the owner now of the entire tract, with my brother,—25 acres of upland and between 15 and 20 acres of the lower flat were in alfalfa in the fall of 1919, when we entered into the contract. It had been previously seeded to alfalfa. In the early spring of 1920 before the moisture

(Testimony of Jay Austin.)

left the ground it was in good shape. The first water we got on [55] this tract of alfalfa was May 20, 1920. That was on the lower tract. The first water we got up above was a good deal after the first of June. From between 55 and 60 acres of this land we got about 89 tons of hay in the season of 1920. If the land had been irrigated properly from April 1st, we should have got somewhere around 335 tons of hay.

Q. Suppose that the defendant here had complied with their contract and furnished you the equipment which you contracted to buy from them so it could have been installed by April 1st, and in fact how much would you have reasonably raised from that tract in 1920?

Mr. THOMAS.—This testimony in regard to loss of crops all goes in over our objection.

The COURT.—Yes.

Upon cross-examination, JAY AUSTIN testified as follows:

My occupation is farming; besides farming I teach school. I have been farming in the State of Washington for five years. I have had some experience raising alfalfa in Nebraska. During the years 1916, 1917 and 1918, the year 1918 is the only year we got water from the well on the North side of the 40-acre tract prior to the 1st day of May. The usual time we began irrigation from that well was the 1st of May. We did not have water in that well sufficient to irrigate be-

(Testimony of Jay Austin.)

fore that time. That well just came in year by year with the exception of the year 1918 along about the first of May. Every year that water was out on there the 1st day of May we raised three crops on the land. None of the hay was damaged during those years. It came out all right. We took a lease upon that 80 acres in 1917; during the year 1918 we broke some of it and put it in alfalfa. In 1918 [56] we got our water for this leased land from a well on Wagner's place. After he finished his irrigation we started irrigating on the leased land; that was some time during July. Wagner had irrigated his tract before that time. His well usually came in about a month later than the other well; his well was about a month behind. He watered his ten, twelve or thirteen acres, whatever he had from this well and started some time between the middle of May and the first of June. He got two crops,—I don't know whether you would call the other a crop or not,—he cut three times. I could not give you the exact date we began to irrigate, around the first of May. The two tracts we irrigated was a tract of alfalfa on the leased land and the Wagner tract. Wagner had an interest in 1918 in the leased land and in the pump, and subsequent, prior to the opening of the season 1919.

With the equipment we now have we can irrigate the Wagner tract together with our hay land and the leased land. If we had had the equip-

(Testimony of Jay Austin.)
ment installed by May 1st, 1920, we would have been able to raise the same amount of crops practically that were raised in 1917, 1918 and 1919 on that land, by getting water on there the 1st of May.

Upon redirect examination, JAY AUSTIN testified as follows:

We have the same method of pump in 1921 that we had in 1920. Before we entered into this contract we did not get water on this land on the old system earlier than the 1st of May because the well on the North 40 was not deep enough. The water came in around the 1st of May. Our old pumping plant was not sufficient to irrigate the land we then had in cultivation. That cut us off of one cutting. We got three cuttings when we should have got four.

[57] **Testimony of Mrs. Remlinger, for Plaintiffs.**

Mrs. REMLINGER, produced as a witness on behalf of the plaintiffs, after being duly sworn, on direct examination, testified as follows:

My name is Mrs. Remlinger and my postoffice is Allard; we live about a mile from there and about 2½ miles from the Austin ranch. We have lived there five years ago to-day. I am familiar with the land of the plaintiffs and was there in the summer of 1919, I was up there then. The condition of the alfalfa was splendid. I saw it again in April, 1920; it was in splendid shape. Along about the middle, or between the 10th and

(Testimony of Mrs. Remlinger.)

20th of May I saw it. It was bad, it was flat, and dried down. I saw it after the 1st of June that summer and the whole field was getting awfully grassy. The alfalfa was thin and scant. The season of 1920 in our section was real dry and hot; it is always awfully hot.

Upon cross-examination, Mrs. REMLINGER testified as follows:

It was the 16th day of April, 1920 that I saw the land the first time. The young alfalfa was coming up fine; if it had gotten water soon after that it needed it right away; on or about the 20th of April would be all right. It looked nice and green. It looked bad in May when I saw it somewhere between the 10th and 20th.

Upon redirect examination, Mrs. REMLINGER testified as follows:

They turned the big pumping plant at Groti irrigation the first of April.

[58] **Testimony of Herbert Arrowsmith, for Plaintiffs.**

HERBERT ARROWSMITH, produced as a witness on behalf of the plaintiffs, after being duly sworn, on direct examination testified as follows:

I know the lands of Austin Bros. from 1913 to 1919. I live about 3½ miles above and across the river. When I left there in the fall of 1919, the last of August, Austin Bros. had a good stand of alfalfa there. I was there the last of May or

(Testimony of Herbert Arrowsmith.)
the first of June, 1920, the alfalfa was all dry; the top 35 acres was so badly spotted it would not pay to irrigate it. It had died out in spots. When I was there in June they were reseeding seven acres that had died out.

Testimony of Eck Baughn, for Plaintiffs.

ECK BAUGHN, produced as a witness on behalf of the plaintiffs, after being duly sworn, testified upon direct examination as follows:

I live in Yakima and am an irrigation or electrical engineer. I have been an electrical engineer for fifteen years and an irrigation engineer for eleven years. I have lived in Yakima for eleven years.

I know the land owned by plaintiffs. I have been over and across these lands at various times. I am familiar with the soil conditions on these lands. They are composed of what we know as Ephrata fine soil, mixed with gravel, with emphasis on the gravel. There is a difference in the amount of water necessary for such as that and land situated in the Yakima valley. Four times as much water as is needed in the Yakima valley is needed on the soil of the Austin place. On the pumping plant we figure the Yakima valley twice what we have for gravity and on the Columbia river we double up on that. [59] I saw these lands in the fall or summer of 1919. The stand of alfalfa was what I would consider good for the Columbia river. I saw it again in April and May,

(Testimony of Eck Baughn.)

1920; the alfalfa looked awful dry to me. I saw it about the 5th or 6th of June; it was drier on the hill, that is, on the 35-acre tract; the other was wet and coming up in pretty good shape. I saw it again in the fall; it was so dry I could not tell much of the condition of the plant life. I saw it again in the spring of 1921; there was not much alfalfa there, a part had been ploughed up and part of it scattered, sheep running on it. There was not sufficient alfalfa on this 35 acres to justify the irrigation of it.

Upon cross-examination, Mr. BAUGHN testified as follows:

My firm is a competitor of Fairbanks, Morse & Co. in the sale of pumps and getting the business. Up in the district where Austin Bros.' property is situated, four times the Yakima Government allowance of water is required to irrigate profitably on account of the soil up there.

[60] **Testimony of C. R. Miller, for Defendant.**

C. R. MILLER, produced as a witness for the defendant, after being duly sworn, on direct examination, testified as follows:

My name is C. R. Miller, I am the local manager of Fairbanks, Morse & Co. at the Seattle office. I am the C. R. Miller whose name appears on this contract with Austin Bros. for the sale of this equipment. After this equipment was ordered by Austin Bros. from Fairbanks, Morse &

(Testimony of C. R. Miller.)

Co. we placed the order with our factory and made endeavor to get delivery made as quickly as possible by telegraph. There was a shortage of raw material of every kind, and shortage of labor. I think every manufacturer was behind with his work at that time; anyway, we had great difficulty in procuring material and making these engines and pumps.

Mr. Powell, the salesman in this case, is not with us at the present time. I do not know where he is. He did not at any time inform us as to the conditions at the Austin place, where this pump was to be located.

One of the Austin Bros. called at our place some time in the latter part of December, 1920. I do not remember whether it was the 28th, 29th or 30th. It was Levi Austin. Mr. Austin wanted to know if the engine he had ordered was the latest type and he wanted some information about the construction of it and I personally showed him another engine exactly like it and gave him the information wanted. He looked at the engine and was apparently satisfied with it. He said nothing else to me at that time, other than he was interested in a larger sized engine which he expected to buy the following year or late that season. Nothing was said about delivery of the equipment at that time that I recollect. Mr. McIntosh, of our firm, has [61] been looking after the details of this transaction. I know Mr. Zane, at Hanford. He is what we call a dealer, or what

(Testimony of C. R. Miller.)

we call Z engine dealer, he sells the small type Z engine, 1½, 3 and 6 horsepower sizes. He buys the engine outright from Fairbanks, Morse & Co. and resells them. That is about all there is to the transaction. We make arrangements with him that he can buy these engines at what we call dealers' price. A 6-horsepower is the largest engine he buys from us on those terms. Besides the 6-horsepower, he buys the 1½ to 3 and 6. Above the 6-horsepower we sell directly throughout the country through our salesmen.

Q. Assuming that Austin Bros. had accepted the proposition from Fairbanks, Morse & Co. for delivery of the 25-horsepower engine during the month of April, 1920, with the four-inch temporary pump, will you state how long it would take to install that in concrete?

Mr. WAGER.—I object to that, it does not show that he knows where this land is located, he has never been on it or knows how long to deliver there and conditions surrounding it.

The COURT.—He asked delivery to their place.

A. Well, it should without any outside force interfering should not take over two weeks to erect a foundation, block of concrete and mount the engine.

Upon cross-examination, Mr. MILLER testified as follows:

Fairbanks, Morse & Co's principal office is in Chicago. I am the agent in Seattle in charge. I

(Testimony of C. R. Miller.)

have been in the employ of Fairbanks, Morse & Co. seventeen years. I have never been on the land of the plaintiffs herein. I do not know, about how [62] long it would take to haul this engine, boiler and pump from the station on the Milwaukee to their well, where it would have to be installed. I know nothing of the condition of the country.

Testimony of W. J. McIntosh, for Defendant.

W. J. McINTOSH, produced as a witness for the defendant, after being duly sworn, upon direct examination testified as follows:

My full name is W. J. McIntosh. I am an engineer. I have been engaged as engineer for Fairbanks, Morse & Co. about four years. Prior to that time I had about twelve years' experience. I followed mechanical and electrical engineering. I have had a common school education, two years in an engineering college besides studying when I was working. For five years I was chief operator of the plants of the Pacific Gas & Electric Co. in Arizona and California, and for three years I was manager of the Western Machine Company in Southern Arizona, the balance of the time I have been in irrigation and mining work. During all the time I was in Arizona I was connected with irrigation business. I have had about four years' experience in irrigation lines in the state of Washington. I am familiar with this case, I am the employee of Fairbanks, Morse & Co. who

(Testimony of W. J. McIntosh.)

has the most to do with this matter. I have conducted the correspondence and negotiations since about April 1st, 1920. That is the time I got into the case. I was in Hanford about April 1st or April 2d, 1920. I spoke to one of the plaintiffs over the telephone at Hanford on April 2, 1920.

We had received a telegram from our factory stating the machinery would be shipped April the 7th, and I told Mr. Austin of this fact and he asked me about how long it would take to get it there if shipped, and I told him about three weeks and he [63] said that would not be time enough, he said he was making arrangements for an electric plant and he was going to try to get a fifteen-horsepower motor and I told him I thought we could do something for him and for him to wait a few days and just as soon as I could I would let him know if we could do anything for him in the way of direct connected outfit and he said all right.

I wrote Austin Bros. on April 9th (Defendant's Exhibit "2"); in reply to that letter I received the letter of April 16th (also Defendant's Exhibit "2"). After I returned to Seattle I wired to several manufacturers and also to our Pacific Coast branches, in an effort to obtain equipment for direct connection, an electric pump and motor; the best I could do was thirty days' shipment. I next offered Austin Bros. a 25-horsepower engine, as they contracted for, and a temporary four-inch pump. The four-inch pump and the engine were

(Testimony of W. J. McIntosh.)

new and both were in stock at our place of business in Seattle. These negotiations were all carried on by correspondence.

Q. If you had received a wire from Austin Bros. on the 14th of April, 1920, in response to your letter of the 9th to ship the temporary equipment, that is, permanent engine and temporary pump, how long would it have taken your company to install that in the well of Austin Bros.?

Mr. WAGER.—We object to that; he does not know anything about the nature of the country, never has been there and does not know conditions as to installation.

Upon cross-examination, Mr. McINTOSH testified as follows:

We had a 25-horsepower engine at our place in Seattle, we had it there all during the winter. It was of the same character as we were selling him; I mentioned this engine in my letter [64] of April 9th; that is the first mention I ever made. The first time I was on the land, I think, was about October, 1920,—I cannot tell the exact time. The new well was dug at that time. I saw it.

Testimony of H. W. Lemke, for Defendant.

H. W. LEMKE, produced as a witness on behalf of the defendant, in direct examination, testified as follows:

My name is H. W. Lemke. I live at Yakima. I own alfalfa land in Benton County. I have

(Testimony of H. W. Lemke.)

one ranch twelve miles from Austin Bros. place and the other about seven. I raised alfalfa in 1919 and 1920. I raised quite a little in 1920. I have 160 acres on both places. I raised about 400 tons of hay in 1920; I was not able to dispose of it during the summer, fall or winter of 1920—could not find any market for it and I sold 20 tons for $12.00 in the stack. All the hay I had in White Bluffs in 1920 was carried over and all I had in Cold Creek was carried over, and I still have it. For market we depend usually on the sheep men and 1920 was a very open season, mild winter,—we had no demand at all. The White Bluffs market is usually local, some hay shipped out; not much shipped out in 1920. I don't know of anyone else that got more than $12.00 per ton for hay in 1920. I think that is the top price, to my knowledge, in the stack.

Upon cross-examination, Mr. LEMKKE testified as follows:

I know the Diamond D. Ranch, owned by Dam Bros. I judge it is sixteen miles, it may be more, from the land of the plaintiffs—it may be only nine, I don't know. I think we raised somewhere around eight hundred or nine hundred tons of hay in 1920. I never heard of their selling it to the sheep men at Ellensburg, in 1920, for $17.00 per ton. I was not fortunate enough [65] to find a market for first and second cuttings of alfalfa in 1920. I never heard that if I baled it I could

(Testimony of H. W. Lemke.)

have shipped to market for $26.00; the average market price of baled hay in the city was $12.00; there did not seem to be any difference between the cuttings; hay was not sold anywhere from $22 to $26 for the first cutting of alfalfa in 1920, to my knowledge.

Testimony of L. A. Safford, for Defendant.

L. A. SAFFORD, produced as a witness on behalf of the defendant, after being sworn, on direct examination, testified as follows:

My name is L. A. Safford. I live at Kennewick, Washington, and am district manager of the Columbia District for the Pacific Power & Light Company. I have been with them eleven years, in the irrigation districts since 1914 and in Kennewick since the fall of 1919. I know the Austin Bros. ranch, have been over it. All my knowledge of it has been since the winter of 1920 and 1921. Austin Bros. made application to our Company for power in the spring of 1820; they had their line finished and ready for power about May 15th. We got it connected about three days later. We agreed to furnish the power provided they made arrangements with Von Herberg to secure the use of his line. If Austin Bros. had got permission from Von Herberg to use his private line we could have given them power the first of April, 1920. We turned the power on their land about the 18th of May, 1920. I think that was the date; I do not think they were quite ready to use the power.

(Testimony of J. C. Lockett.)

Upon cross-examination, Mr. SAFFORD testified as follows:

Austin Bros. constructed this line themselves.

[66] **Testimony of J. C. Lockett, for Defendant.**

J. C. LOCKETT, produced as a witness on behalf of the defendant, after being duly sworn, testified as follows:

My name is J. C. Lockett. I live at Toppenish. I run a machine-shop there, installation and pumping equipment. I have been there about fourteen years and I sell pumps. I had two, three, four, one six and one eight" pumps in stock during the month of May, 1920. I know nothing about the amount of water required in the Hanford country. I am not familiar with that country.

Upon cross-examination, Mr. LOCKETT testified as follows:

I handle Fairbanks, Morse stuff in Toppenish along with other stuff.

Testimony of R. W. Judd, for Defendant.

R. W. JUDD, produced as a witness on behalf of the defendant, on direct examination, testified as follows:

I live at White Bluffs, I have lived there since October, 1909. My occupation is farming, at the present time; I have thirty acres; raise alfalfa, corn and potatoes. I have raised alfalfa since 1913; in the spring of 1913 my three brothers and I started a ranch in the Columbia River, that

(Testimony of R. W. Judd.)

property is now Austin Bros. We made the sales contract to the Austins on March 24, 1916, and they took possession on May 1st, 1916. We irrigated the tract of alfalfa on that forty from a well located about the North edge of it. I do not know how long that well had been dug prior to 1916; it had been there a good many years previous to that. We used that well all the time. We had splendid well water in 1913, the first year we were [67] there, we did not attempt to use it very freely; the next two years used it and got water along about the 20th of April until the 1st of May. We started seeding in 1913; we started the water along about the 21st or 22d of April in 1914; we got three crops off that alfalfa that had been seeded the year before, we got about five tons per acre. It was a good crop for the second year of alfalfa. In 1915 we got the water on about the same time, along some time after the 20th of April. The water did not come up high enough in the well to reach it with a suction pump we had there earlier. I would say we got 300 to 400 gallons per minute from the three-inch pump and 20-horsepower engine. We left the pump on the place for Austins when we sold. We moved off May 3, 1916. I think the water had been turned on three or four days when we left. I started in about the last of April or the first of May. There had been about six acres of the place watered when they took possession.

(Testimony of R. W. Judd.)

In 1915 I think we cut about 120 tons of hay off about 32 acres.

It costs about $6.00 per ton to put the hay in the stack; this includes the cultivating, irrigating and harvesting. The market value of hay in the section from Austin Bros.' place up to White Bluffs during the fall and winter of 1920 was about $12.00 per ton. I bought some for $10.00 from Fred Wile, about twelve miles from the Austin place; I didn't have any hay to sell; some years hay is shipped out of that country; depends on the local market, most of them depend on the sheepmen to buy it. My experience has not shown that if water is not placed upon alfalfa during the first month of the season, or the first month and twenty days of the irrigating season, that the alfalfa roots will suffer any permanent injury. I have been raising [68] alfalfa for eight years; I have observed alfalfa where it has been deprived of water for a month and a half or two months, at the beginning of the season, in that part of the country in which the Austin Bros. are situated. I would not consider it permanently injured from what I have seen there. The second crop would not be as good; the third would be just about as good as ordinary. If they had water again in the spring following it would not be materially damaged; it is pretty hard to kill alfalfa.

(Testimony of R. W. Judd.)

Upon cross-examination, Mr. JUDD testified as follows:

The old well started seeping along about the first of April.

Upon redirect examination, Mr. JUDD testified as follows:

Quite a bit of hay was unsold in 1920 and is still there.

Testimony of E. D. Wagner, for Defendant.

E. D. WAGNER, produced as a witness for defendant, upon direct examination, testified as follows:

My name is E. D. Wagner and I live at Yakima; before coming to Yakima I lived in White Bluffs and vicinity. I had land adjoining that tract of Austin Bros. Before coming to Yakima I lived there between six and seven years. I moved on there in 1913 and lived on there until the middle of April, 1920. I had 30 acres of land, 12 or 13 in alfalfa. I got water on my alfalfa about the 20th of May from an individual pumping plant in the well on my place. I irrigated my land only with a 3½″ pump, during the years I was there I got water along about the 20th of May; We got no water on the land at all prior to the 20th of May when I was there. The water would not come in the well, it was a late well. I started to irrigate about the 20th of May of each year. I cut three crops. From 1913 to 1917 the [69]

(Testimony of E. D. Wagner.)

alfalfa raised on that land averaged about five tons to the acre. I cannot say that it was damaged very much by reason of not getting water on there before May 20th; it was damaged some; I cannot say that there was permanent injury at any time. Later, I installed another pump in that well, a 5" pump with a 15-horsepower engine. In that pump and engine and well Austin Bros. were interested with me. This new pump was put in in the early spring of 1919. From the 5" pump and 15-horsepower engine we watered the state land South of my place,—school land. I had an interest in that with Austins, we were jointly interested in the land in the year 1919; Austin Bros. also had an interest in the pump and engine. I should judge we watered about 15 acres of the school land in 1919. I cannot say that there was any more during the year 1920. I left there in April 1920. I assisted in planting or seeding the alfalfa. I think we put ours in in July, 1919. I had an interest in the alfalfa on the school land just one season, 1918. The pump and engine after 1919 was moved over on the school land and installed on the school land in the new well. The pump and engine that was on my place, the one I had an interest in, was in there in April, 1920. In 1916, 1917 and 1918 the well came in so we could pump water on the north side anywhere from the 15th of April to the first of May. I cannot remember that it was ever as late as the first of May, I do not think it was ever earlier than the 15th of April.

(Testimony of E. D. Wagner.)

The winter of 1920 was a mild winter.

Upon cross-examination, Mr. WAGNER testified as follows:

I had no connection whatever with the irrigation of Austin Bros.' land in 1919; it was in 1918 that I was connected with them. My land was right close to the river, between Austin [70] Bros.' land and the river. The average lift of pump was about 25 feet, high water would be about 18 feet. I do not think the river has anything to do with the moisture. It was much lower than the land of Austin Bros. on the hill. It was nearer the river than Austin Bros., except the school land was about the same level; mine was in between the school land and the river. This oil pump was in the well in 1920. I was not there in April, 1920, I am positive of that.

Testimony of Jay Austin for Plaintiffs (Recalled in Rebuttal).

JAY AUSTIN, recalled on behalf of the plaintiffs, testified as follows:

There was no pump or engine on our place in our well in 1920, we sold that engine and delivered it some time in March.

[71] Mr. CAMPBELL.—We move the Court to withdraw from the consideration of the jury the question of the damages, if any, sustained by plaintiffs on account of the loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground and for the reason that such damages,

if any, are too remote, speculative, and not within the minds or contemplation of the parties at the time the contract was entered into, and there can be no recovery therefor.

The COURT.—I will deny the motion to withdraw the question of damages for loss of crops and permanent injury to the alfalfa from the consideration of the jury, but will compromise with you by submitting a special finding to the jury, asking how much, if any, of the damages thus found or allowed is for loss of crops and for injury to the growing crops, and if they find against you let them find for the amount of damages sustained by reason of loss of crops and injury to the growing crops. You can then file a motion for a judgment upon the verdict for general damages and the plaintiffs can file a motion for judgment upon the verdict for general and special damages. You are apparently prepared on this question and it comes as a surprise to the plaintiffs and they are not prepared on it and I have not had an opportunity to fully examine the authorities, but what authorities you have here would indicate that your motion should be granted. The plaintiffs may have ten days in which to submit their authorities, and you may have ten days to reply. If, upon examination of the authorities submitted, I find that the question of special damages for loss of crops and permanent injury to the alfalfa should not have been submitted to the jury, the verdict as to those items can be set aside,

if necessary, [72] without granting a new trial. At the time you move for judgment on the verdict for general damages and the plaintiffs move for judgment on the verdict for general and special damages, in the event a verdict is returned against you for both, feeling and believing as I do now, I will grant your motion.

Mr. CAMPBELL.—We except to that portion of the Court's ruling refusing to withdraw from the consideration of the jury the special damages for loss of crops and permanent injury to the alfalfa.

After the close of the testimony, the Court instructed the jury as follows:

Instructions of Court to Jury.

This is an action to recover damages for breach of a contract for the sale and delivery of a pumping plant. The execution of the contract is admitted, and it is also admitted there was a breach of the contract on the part of the defendant. In other words, the contract called for delivery of pumping plant on or before Dec. 1, 1919, and it is admitted that it was not delivered or tendered until subsequent to March 30, 1920. The only questions before you, therefore, relate to the measure of damages. The items of damages claimed are four in number. The first item is for the return of the $200.00 paid at the time of the execution of the contract. The second item claimed is the cost of installation of a temporary plant to supply water after breach of the contract set

forth in the complaint. The third item is for loss of crops during 1919 and the fourth is for permanent injury to the alfalfa growing on the land. The first item of two hundred dollars under the contract, plaintiffs, as a matter of course, is entitled to recover with legal interest from the 30th day of March, 1920. Conceding that the contract was breached by the defendant, as [73] claimed, as said by the Supreme Court of the United States:

> "Where a party entitled to the benefit of a contract can save himself from loss arising from breach of it at a trivial expense or with reasonable exertion, it is his duty to do it and he can charge the delinquent with such damage only as with reasonable endeavors and expense he could not have prevented."

In other words, if you find the contract was breached by the defendant, and I charge you it was so breached, it then became the duty of the plaintiffs to make reasonable exertion to mitigate the damages. If they have failed in this they cannot recover. If they did exercise reasonable care to avoid damages they are entitled to recover whatever damages they suffered in so doing. They are not entitled to recover the expense of installing their plant, however, because that is not the true measure of damages. They could not retain the plant and recover the entire cost of installation. The measure of damages is the difference between the actual value of the plant at the expiration of such time as the plaintiffs should have installed the plant called for by the contract, or some other

plant to serve the same purpose and the cost and expense of installation. The third and fourth items relate to the loss of crops and injury to the crops or land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage. The Supreme Court of the United States has defined proximate cause as follows:

> "It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as the oft cited case of the squib thrown in the market place. Scott vs. Sheppard (Squib case) 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous [74] operation. Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application, but it is generally held that in order

to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the value of the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course to determine the net value you must make deductions for all expense incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, that the growing alfalfa was injured, and that such injury resulted directly or proximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in this regard.

You, Gentlemen of the Jury, are the sole judges of the facts in this case and of the credibility of the witnesses. Before reaching a verdict, you will carefully consider and compare all the testimony; you will observe the demeanor of the witnesses upon the stand; their interest in the result of your verdict, if any such interest is disclosed;

their knowledge of the facts in relation to which they have testified; their opportunity for hearing, seeing or knowing these facts; their bias or prejudice and all the facts and circumstances given in evidence or surrounding the witnesses at the trial. I further charge you, [75] that if you find from the testimony that any witness has wilfully testified falsely to a material fact you may disregard the testimony of such witness entirely except in so far as he is corroborated by other credible testimony, or by other known facts in the case.

The burden of proof is upon the plaintiffs in this case to establish their claim by a preponderance of the testimony. A preponderance of the testimony does not necessarily mean the greater number of witnesses, but rather the convincing force of the testimony as against the testimony offered by the opposing party.

Your verdict, of course, must be based on the evidence and not upon mere conjecture or guess work. There is some question in this case whether the parties are entitled to recover for loss of crops, or injury to crops, but that is a question of law for the consideration of the Court, and I have therefore submitted to you a general verdict in favor of the plaintiffs, and also the following special verdict, or finding."

To that part of the Court's instructions to the jury relative to approximate cause, not quoted from the United States decision, reading as follows:

"The third and fourth items relate to the loss of crops and injury to the crops or land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage." . . .

"If you find that the plaintiffs suffered damage*d* by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages, then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the value of the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course, to determine the net value you must make deductions for all expenses incurred in growing and harvesting the crop. The other item is based on [76] the same ground. If you find that the alfalfa land was injured, that the growing alfalfa was injured, and that such injury resulted directly or approximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in this regard";

the defendant then and there excepted, which exception was by the Court allowed.

The jury then retired and after a short absence returned into court with a verdict in favor of the plaintiffs for general and special damages in the sum of $3088.00, accompanied by the following special finding:

Question: How much, if any, of the damages thus found or allowed is for the loss of crops and for injury to the growing crops?

Answer: Loss of hay, $1,674, permanent injury to crops, $840.

This verdict was returned on the 12th day of October, 1921. Thereafter the plaintiffs moved for judgment on the verdict of the jury in their favor and against the defendant in the sum of $3,088.00, and defendant moved for judgment on the verdict of the jury in favor of the plaintiffs and against the defendant for the sum of $574.00, and for no other or greater sum, together with costs to be taxed by the clerk.

Thereafter and on or about the —— day of April, 1922, the motion of the plaintiffs for judgment on the general verdict was granted and the motion on the part of the defendant was denied. On the 17th day of April, 1922, the Court made and signed its judgment on the verdict of the jury, to which judgment on the verdict of the jury defendant excepted, and its exception was allowed.

And now, in furtherance of justice, and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and

prays that the same may be settled, allowed, signed and certified by the trial Judge as provided by law.

J. D. CAMPBELL,
VAN DYKE & THOMAS,
Attorneys for Defendant.

[77] Filed in the U. S. District Court, Eastern District of Washington. May 26, 1922. Alan G. Paine, Clerk. Edwd. E. Cleaver, Deputy.

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[78] In the District Court of the United States for the Eastern District of Washington, Southern Division.

LEVI F. AUSTIN and J. R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS, HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendants.

Motion for Judgment on the Verdict.

Come now the plaintiffs, appearing by their attorneys, E. E. Wager and J. C. Lloyd, and move the Court to enter judgment on the verdict of the jury in the above-entitled cause, in favor of the plaintiffs and against the defendants for the sum of Three Thousand and Eighty-eight ($3088.00)

Dollars, and which amount is based upon the following special findings of the jury.

For loss of and damage to the hay crop of the year 1920 upon the premises described in the complaint	$1674.00
For damage to and destruction of the alfalfa plant and the roots thereof on said land during said year	840.00
For partial cost of temporary transmission power line built to mitigate damages and the hydro-electric power used during irrigation season 1920 ..	350.00
For cash advanced by plaintiffs under contract and the interest thereon	224.00

And for plaintiffs costs and disbursements to be taxed.

Dated this 12th day of October, 1921.

EUGENE E. WAGER and
JAMES COLLINS LLOYD,
Attorneys for Plaintiffs.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 12th, 1921. W. H. Hare, Clerk.

[79] In the District Court of the United States for the Eastern District of Washington, Southern Division.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS, HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

Motion for Judgment on the Verdict.

Comes now the defendant by its attorneys Van Dyke & Thomas and J. D. Campbell, and moves the Court to enter judgment on the verdict of the jury in favor of the plaintiffs and against the defendant for the sum of $574.00, and for no other or greater amount, together with costs to be taxed by the Clerk.

Dated this 12th day of October, 1921.

VAN DYKE & THOMAS,
J. D. CAMPBELL,
Attorneys for Defendant.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 12th, 1921. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

[80] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN, and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

Memorandum.

EUGENE E. WAGER and J. C. LLOYD, Attorneys for Plaintiffs.

J. D. CAMPBELL and VAN DYKE & THOMAS, Attorneys for Defendant.

RUDKIN, District Judge.

This was an action to recover damages for the breach of a contract for the sale and delivery of a pumping plant for irrigation purposes. The contract was entered into on the 25th day of September, 1919, and called for shipment or delivery on December 1st of the same year. The contract was never complied with on the part of the defendant. The plaintiffs claimed, among other items, dam-

ages for loss of crops during the season of 1920 and for permanent injury to the alfalfa growing upon the land. The defendant insisted throughout the trial and still insists that the latter items are too remote and speculative and that there can be no recovery therefor. The Court, however, submitted that question to the jury under appropriate instructions to which no exception was taken, and also submitted a special finding so that the objectionable items could be eliminated from the verdict if necessary without granting a new trial. The jury thereupon returned a general verdict in favor of the plaintiffs for the sum of $3088.00, accompanied by the following special finding:

> "Question: How much, if any, of the damages thus found or allowed is for loss of crops and for injury to growing crops?
>
> "Answer: Loss of hay, $1674.00; permanent injury to crops, $840.00."

[81] The plaintiffs now moved for judgment on the general verdict, while the defendant moves for judgment in favor of the plaintiffs and against itself in the sum of $574.00, being the amount of the general verdict less the two items complained of.

I have carefully considered the exhaustive briefs submitted by the respective parties and have examined the numerous authorities cited, as well as others, but any attempt to review the many apparently conflicting decisions would be of no avail. Suffice it to say that while the case is perhaps on the border line, I am not prepared to declare as a matter

of law that the jury was not warranted in finding that such damages were within the contemplation of the contracting parties at the time the contract was entered into and flowed directly and approximately from the breach complained of.

The motion of the plaintiffs for judgment on the general verdict is therefor granted, and interest will be allowed at the legal rate from the date of the verdict until the date of judgment, the interest to be computed up to that date and form a part of the judgment.

The motion on the part of defendant is denied.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. April 7th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver Deputy.

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[82] In the District Court of the United States for the Eastern District of Washington, —— Division.

AUSTIN BROTHERS,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO.,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiffs and assess the damages in the sum

of Three Thousand and Eighty-eight and no/100 Dollars.

GEORGE ALEXANDERS,
Foreman.

Question: How much, if any, of the damages thus found or allowed is for loss of crops or for injury to growing crops.

Answer: Loss of hay $1674.00. Permanent injury to crop $840.00.

GEORGE ALEXANDER,
Foreman.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. October 12th, 1921. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

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[83] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS, HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE AND COMPANY, a Corporation,

Defendant.

Judgment.

This cause came on regularly for trial on the 11th day of October, 1921, the plaintiffs appearing by their attorneys, Messrs. Eugene E. Wager and J. C. Lloyd, and the defendant by its attorneys, Van Dyke & Thomas and J. D. Campbell, Esq., whereupon a jury of twelve persons was duly empanelled and sworn to try the cause; witnesses on the part of the plaintiffs and defendant were sworn and examined, and documentary evidence introduced; and after hearing the arguments of counsel and the instructions of the Court, the jury retired to consider of their verdict and thereafter returned into court a verdict signed by the foreman, as follows: We the jury in the above-entitled cause find for the plaintiffs, and assess their damages in the sum of $3088.00, accompanied by the following special finding:

> "Question: How much, if any, of the damages thus found or allowed is for loss of crops and for injury to growing crops?
>
> "Answer: Loss of hay, $1674.00; Permanent injury to crops, $840.00."

The motion of the plaintiffs for a judgment on the general verdict, having been granted, and the motion of the defendant for a judgment in favor of the plaintiffs and against the defendant in the sum of $574.00 having been overruled,

It is CONSIDERED, ORDERED AND ADJUDGED by the Court that the plaintiffs do have and recover of and from the defendant the sum

[84] of $3,183.21, together with their costs and disbursements taxed at $——.

Dated this 17th day of April, 1922.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. April 17th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[85] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN, and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

Exception to Judgment.

Comes now the defendant Fairbanks, Morse & Company, a corporation, by its attorneys of record and excepts to the judgment on the verdict of the jury in the above-entitled action, signed by the Court on the 17th day of April, 1922.

Dated this 24th day of April, 1922.

VAN DYKE & THOMAS,
J. D. CAMPBELL,
Attorneys for Defendant.

The foregoing exception of the defendant to the judgment on the verdict of the jury, entered in the above-entitled action on the 17th day of April, 1922, is hereby allowed.

Done in open court this 24th day of April, 1922.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. April 27th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[86] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

Petition for New Trial.

Comes now the defendant above named, Fairbanks, Morse & Co., a corporation, by Messrs. J. D. Campbell and Van Dyke & Thomas, its attorneys, and moves the Court that the verdict rendered herein and the judgment based thereon be set aside and that a new trial be granted herein, for the following causes which materially affect the substantion rights of the said defendant, to wit:

1. Irregularity in the proceedings of the Court by which the defendant was prevented from having a fair trial.

2. Excessive damages, appearing to have been given under the influence of passion or prejudice.

3. Insufficiency of the evidence to justify the verdict or the judgment based thereon,—

In that it was not shown by pleadings or testimony that the special damages allowed for loss of crops, or permanent injury to the alfalfa, were reasonably supposed to be within the contemplation of the plaintiffs or defendant at the time the contract was signed, or that said special damages were such as might naturally be expected to follow its violation, or that defendant knew the extent of the plaintiffs' farming operations, the number of acres of alfalfa they had under cultivation, the number of acres of alfalfa they had intended to plant, or the precise [87] time of the year when water was needed upon lands in the locality of plaintiffs' ranch, to all of which defendant ex-

cepted at the trial and which exceptions were allowed.

4. Errors in law occurring at the trial;

(a) In allowing the plaintiffs to file the amendment to their complaint, to which filing the defendant excepted at the trial and which exception was allowed.

(b) In admitting the testimony of Levi Austin, one of the plaintiffs, regarding his conversation with Mr. Powell, the agent of defendant, prior to the execution of the contract upon which this suit is based, to the admission of which testimony the defendant excepted at the trial and which exception was allowed.

(c) In admitting any testimony whatever regarding loss of crops, or permanent injury to the alfalfa, upon the land of plaintiffs, to which admission the defendant excepted at the trial and which exception was allowed.

(d) In refusing to withdraw from the consideration of the jury the question of damages, if any, sustained by plaintiffs on account of loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground that such damages, if any, are too remote, speculative, and not within the minds or contemplation of the parties at the time the contract was entered into, to all of which defendant excepted at the trial and which exception was allowed by the Court.

(e) In using the following language in instructing the jury:

"The third and fourth items relate to the loss of crops and injury to the crops and land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage.

If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages, then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the value of the alfalfa which they actually cut and harvested and the net value of [88] what they would have harvested had the contract been fulfilled. Of course, to determine the net value you must make deductions for all expense incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, that the growing alfalfa was injured, and that such injury resulted directly or proximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in this regard."

To which foregoing part of the Court's instruction defendant excepted at the trial, and which exception was allowed.

(f) In rendering judgment on the verdict of the jury in favor of the plaintiffs and against the defendant for any sum in excess of Five Hundred Seventy-four Dollars ($574.00) and costs, to which entry the defendant excepted and which exception was allowed by the Court.

This petition will be heard upon the pleadings and papers on file, upon the minutes of the court, the statement of facts prepared by the reporter from his shorthand notes, and the memoranda of proceedings in chambers hereto attached.

J. D. CAMPBELL,
VAN DYKE & THOMAS,
Attorneys for Defendant.

[89] United States of America,
Western District of Washington,—ss.

Josiah Thomas, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant in the above-entitled cause; that he has read the foregoing petition for a new trial, knows the contents thereof, and believes the same to be meritorious and well founded in law and not interposed for the purpose of delay.

JOSIAH THOMAS.

Subscribed and sworn to before me this 24th day of May, 1922.

[Seal] CHARLES E. CONGLETON,
Notary Public in and for the State of Washington, Residing in Seattle.

[90] Mr. CAMPBELL.—We move the Court to withdraw from the consideration of the jury the question of the damages, if any, sustained by plaintiffs on account of the loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground and for the reason that such damages, if any, are too remote, speculative, and not within the minds or contemplation of the parties at the time the contract was entered into, and there can be no recovery therefor.

The COURT.—I will deny the motion to withdraw the question of damages for loss of crops and permanent injury to the alfalfa from the consideration of the jury, but will compromise with you by submitting a special finding to the jury, asking how much, if any, of the damages thus found or allowed is for loss of crops and for injury to the growing crops, and if they find against you let them find for the amount of damages sustained by reason of loss of crops and injury to the growing crops.

You can then file a motion for a judgment upon the verdict for general damages, and the plaintiffs can file a motion for judgment upon the verdict for general and special damages. You are apparently prepared on this question, and it comes as a surprise to the plaintiffs and they are not prepared on it and I have not had an opportunity to fully examine the authorities, but what authorities you have here would indicate that your motion should be granted. The plaintiffs may have ten days in which to submit their authori-

ties, and you may have ten days to reply. If, upon examination of the authorities submitted, I find that the question of special damages for loss of crops and permanent [91] injury to the alfalfa should not have been submitted to the jury, the verdict as to those items can be set aside, if necessary, without granting a new trial. At the time you move for judgment on the verdict for general damages and the plaintiffs move for judgment on the verdict for general and special damages, in the event a verdict is returned against you for both, feeling and believing as I do now, I will grant your motion.

Mr. CAMPBELL.—We except to that portion of the Court's ruling refusing to withdraw from the consideration of the jury the special damages for loss of crops and permanent injury to the alfalfa.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. May 26th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver.

[92] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiff,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

Order Overruling Motion for New Trial.

Defendant's motion that the verdict rendered herein and the judgment based thereon be set aside and that a new trial be granted herein having come on regularly for hearing and determination before the Court at Spokane, Washington, on this 9th day of October, 1922, said motion having been submitted by defendant without argument in order to get the same disposed of, it is

ORDERED, ADJUDGED AND DECREED that said motion of the defendant to have the verdict rendered herein and the judgment based thereon set aside and to have a new trial granted herein be and the same is hereby denied, to which

ruling the defendant excepts and the exception is hereby allowed.

Done in open court this 9th day of October, 1922.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[93] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

Fairbanks, Morse & Company, defendant in the above-entitled action, feeling itself aggrieved by the verdict of the jury, and the judgment entered thereon, on the 17th day of April, 1922, comes now

by J. D. Campbell, and Van Dyke & Thomas, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and your petitioner will ever pray.

Dated, October 12, 1922.

J. D. CAMPBELL,
VAN DYKE & THOMAS,
Attorneys for Defendant.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[94] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

Upon motion of J. D. Campbell, and Van Dyke & Thomas, attorneys for the defendant in the above-entitled action, and upon filing the petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is, allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict of the jury and the judgment entered thereon, on the 17th day of April, 1922, and that the amount of bond on said writ of error be, and hereby is, fixed at $3,500.00, which bond shall be a supersedeas bond.

Done in open court this 12th day of October, 1922.

FRANK H. RUDKIN,

Judge of the United States District Court, for the Eastern District of Washington, Southern Division.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[95] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

Writ of Error.

The President of the United States, to the Honorable, the Judge of the United States District Court, for the Eastern District of Washington, Southern Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the plaintiffs, Levi P. Austin and Jay R. Austin, copartners doing business under the firm name and style of Austin Brothers; Helen S. Austin and Nettie M. Austin, as Trustee, and Fairbanks, Morse & Company, a corporation, defendant, a manifest error hath happened to the great prejudice and damage of the said plaintiffs, Levi P. Austin and Jay R. Austin, copartners doing business under the firm name and style of Austin Brothers; Helen S. Austin, and Nettie M. Austin, as Trustee, as is said and appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings, aforesaid, with all things concerning the same, to the justices of the United States Court of Appeals, for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said cir-

cuit on the —— day of [96] November, 1922, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 14th day of October, 1922.

Attest my hand and seal of the United States District Court for the Eastern District of Washington, Southern Division, at the Clerk's office in Yakima, Washington, on the day and year last above written.

[Seal] ALAN G. PAINE,
Clerk of the United States District Court, for the Eastern District of Washington, Southern Division.

By Edwd. E. Cleaver,
Deputy.

Allowed this 12th day of October, 1922.

FRANK H. RUDKIN,
Judge of the United States District Court, for the Eastern District of Washington, Southern Division.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[97] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendants.

Assignment of Errors.

And now on this 12th day of October, 1922, came the defendant, by its attorneys J. D. Campbell and Van Dyke & Thomas, and say that the verdict of the jury, and the judgment entered thereon in the above-entitled cause, on the 17th day of April, 1922, is erroneous and unjust to defendant.

I.

The District Court erred in allowing the plaintiffs to file the amendment to their complaint, to which filing the defendant excepted at trial, and which exception was allowed.

II.

The District Court erred in admitting the testimony of Levi Austin, one of the plaintiffs, re-

garding his conversation with Mr. Powell, the agent of defendant, prior to the execution of the contract upon which this suit is based, to the admission of which testimony the defendant excepted at the trial, and which exception was allowed.

III.

The District Court erred in admitting any testimony whatever regarding loss of crops, or permanent injury to the alfalfa, upon the land of plaintiffs, to which admission the defendant excepted at the trial, and which exception was allowed.

[98] IV.

The District Court erred in refusing to withdraw from the consideration of the jury the question of damages, if any, sustained by plaintiffs on account of loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground that such damages, if any, are too remote, speculative, and not within the minds or contemplation of the parties at the time the contract was entered into, to all of which defendant excepted at the trial and which exception was allowed by the court.

V.

The District Court erred in using the following language in instructing the jury:

> "The third and fourth items relate to the loss of crops and injury to the crops and land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to

recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage.

If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages, then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course, to determine the net value, you must make deduction of all expenses incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, and the growing alfalfa injured, and that such injury resulted directly and proximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in that regard."

to which foregoing part of the Court's instruction defendant excepted at the trial, and which exception was allowed.

VI.

The District Court erred in rendering judgment on the verdict of the jury in favor of the plaintiffs and against the defendant, for any sum in excess of Five Hundred Seventy-four Dollars ($574.00) and costs, in that it was not shown by pleadings

or testimony that the special damage allowed for loss of crops, or permanent injury to the alfalfa, were reasonably supposed to be within the contemplation of the plaintiffs or defendant at the time the contract was signed, or that said special damages were such as might naturally be expected to follow its violation, [99] or that defendant knew the extent of the plaintiffs' farming operations, and the number of acres of alfalfa they had under cultivation, the number of acres they had intended to plant, or the precise time of the year when water was needed upon lands in the locality of plaintiffs' ranch, to all of which defendant excepted at the trial, and which exceptions were allowed.

VII.

The District Court erred in denying defendant's motion for a new trial.

WHEREFORE, the defendant prays that the judgment entered herein for any sum in excess of $574.00, and costs, be reversed, vacated, and set aside, and that the District Court be directed to enter judgment in favor of plaintiffs and against defendant for the sum of $574.00 only, together with costs.

VAN DYKE & THOMAS,
J. D. CAMPBELL,
Attorneys for Defendant.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[100] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Fairbanks, Morse & Company, a Corporation, as principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Levi P. Austin and Jay R. Austin, copartners doing business under the firm name and style of Austin Brothers, Helen S. Austin and Nettie M. Austin, as Trustee, in the full and just sum of $3,500.00 to be paid to the said plaintiffs, their heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

SEALED with our seals and dated this 12th day of October, 1922.

WHEREAS, lately in the above-entitled court, in a suit depending in said court, between Levi P. Austin and Jay R. Austin, copartners doing business under the firm name and style of Austin Brothers, Helen S. Austin and Nettie M. Austin, as Trustee, as plaintiffs, and Fairbanks, Morse & Company, as defendant, a judgment was rendered against the said Fairbanks, Morse & Company, and the said Fairbanks, Morse & Company, having obtained a writ of error and filed a copy thereof in the office of the clerk of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Levi P. Austin and Jay R. Austin copartners doing business under the firm name and style of Austin Brothers, Helen S. Austin and Nettie M. Austin, as Trustee, citing and admonishing them to be and [101] appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

NOW, THEREFORE, the condition of the above obligation is such that if the said Fairbanks, Morse & Company, shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

FAIRBANKS, MORSE & COMPANY,
By J. D. CAMPBELL,
Its Attorney.

UNITED STATES FIDELITY & GUARANTY COMPANY,
[Seal] By O. W. ANDERSON,
Its Attorney in Fact.

Approved Oct. 12, 1922.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[102] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

Citation.

United States of America; To the Plaintiffs, Levi P. Austin and Jay R. Austin, Copartners Doing Business Under the Firm Name and Style of Austin Brothers; Helen S. Austin; and Nettie M. Austin, as Trustee, and Their Attorneys, Eugene E. Wager and James Collins Lloyd, GREETING:

You are hereby notified that in a certain case at law in the United States District Court in and for the Eastern District of Washington, Southern Division, wherein Levi P. Austin and Jay R. Austin, copartners, doing business under the firm name and style of Austin Brothers; Helen S. Austin; and Nettie M. Austin, as Trustee, are complainants, and Fairbanks, Morse & Company is defendant, a writ of error has been allowed the plaintiff therein in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and you are cited and admonished to be and appear in said court at San Francisco, California, in thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, Judge of the United States District Court, for the Eastern District of Washington, Southern Division, date this 12th day of October, 1922.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[103] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

Order Staying Mandate.

This cause coming on to be heard this 12th day of October, 1922, upon the application of the defendant for a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and said writ of error having been allowed, the said defendant having executed a bond in the sum of $3,500.00 as provided by law and the order of this court, the Clerk of the said Court is hereby directed to stay the mandate of the said District Court of the United States for the Eastern District of Washington, Southern Division, until the further order of this court.

Dated this 12th day of October, 1922.

FRANK H. RUDKIN,
Judge of the Above-entitled Court.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[104] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

Order Settling Bill of Exceptions.

The above matter came on duly and regularly for hearing on the 9th day of October, 1922, at Spokane, Washington, upon the application of the defendant for the settling and certifying of its proposed bill of exceptions filed herein and on the amendments proposed by plaintiffs to said bill of exceptions, and the said bill of exceptions having been presented, served and filed within the time allowed by law and the proposed amendments not

being in the form prescribed by the rules of this court, but the court nevertheless having carefully examined the same and being fully advised as to such proposed amendments to the bill of exceptions it is

ORDERED that the amendments proposed by plaintiff to the bill of exceptions and each of them be refused and not allowed.

IT IS FURTHER ORDERED that the proposed bill of exceptions heretofore filed by plaintiffs in this case is hereby approved, allowed and settled as the true, full and correct bill of exceptions in said cause, containing in full all of the material evidence and proceedings taken and had upon the trial of said cause and that the same as so settled and allowed be now here certified accordingly by the undersigned Judge of the said court who presided at the trial of said cause, and that the bill of exceptions when so certified be filed herein by the clerk.

The foregoing bill of exceptions is full, true and correct in all respects and is hereby approved, allowed and settled and made a part [105] of the record herein with plaintiffs' and defendants' exhibits thereto attached.

Done in open court this 9th day of October, 1922.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[106] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendants.

Proof of Service of Papers.

State of Washington,
County of Spokane,—ss.

A. Bolton, being first duly sworn, deposes and says: I am a citizen of the United States and of the State of Washington above the age of twenty-one years and competent to be a witness in the above-entitled action. That on the 12th day of October, 1922, I deposited in the postoffice at Spokane, Washington, properly wrapped for transmission through the mail with registered mail postage prepaid, the following papers, viz:

Order overruling motion for new trial.
Order settling bill of exceptions.
Assignment of errors.

Petition for writ of error.
Order allowing writ of error.
Writ of error.
Citation.
Bond upon writ of error.
Order staying mandate.
Praecipe for transcript of record.

all addressed to Attorney James Collins Lloyd, at White Bluffs, Washington, and that there is a regular United States mail service between Spokane, Washington, and White Bluffs, Washington.

A. BOLTON.

Subscribed and sworn to before me this 12th day of October, 1922.

[Seal] J. D. CAMPBELL,
Notary Public, Residing at Spokane, Washington.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[107] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare Transcript of Record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Complaint.
2. Answer and affirmative defenses.
3. Reply to affirmative defenses.
4. Motion to amend complaint.
5. Affidavit in support of amendment to complaint.

6. Bill of particulars.
7. Motion of plaintiffs for judgment on the verdict.
8. Motion of defendants for judgment on the verdict.
9. Memorandum of judgment.
10. Verdict of Jury.
11. Judgment, with defendant's exception to judgment and its allowance.
12. Petition for a new trial, with acknowledgment of service of said petition.
13. Order overruling motion for a new trial.

[108] 14. Petition for writ of error.
15. Order allowing writ of error.
16. Writ of error.
17. Assignment of errors.
18. Bond on writ of error.
19. Citation upon writ of error.
20. Order staying mandate.
21. Bill of exceptions and order settling same.
22. All of the exhibits offered and admitted in evidence at the trial of the above-entitled cause.
23. Acknowledgment of service of the following papers or proof of service or both.

Order overruling motion for a new trial.
Order settling bill of exceptions.
Petition for writ of error.
Order allowing writ of error.
Writ of error.
Assignment of errors.
Bond on writ of error.

Praecipe for transcript of record.
Citation upon writ of error.
Order staying mandate.

Said transcript to be prepared as required by law, and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and to be filed in the office of the Clerk of the said Circuit Court of Appeals, at San Francisco, State of California, before the —— day of November, 1922.

Dated October 12, 1922.

VAN DYCKE & THOMAS,
J. D. CAMPBELL,
Attorneys for Defendant.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[109] We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing, as provided by the rules of said Court.

VAN DYCKE & THOMAS,
J. D. CAMPBELL,
Attorneys for Defendant.

[110] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the United States District Court, for the Eastern District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered 1 to 111 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the

record on return to said writ of error herein from the judgment of said United States District Court for the Eastern District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate, or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled Cause, to wit:

Clerk's Fee (Sec. 828, R. S. U. S.) for making record, Certificate or Return, 259 folios at 10¢	$25.90
Certificate of Clerk to Transcript of Record, 3 folios at 15¢	$ .45
[111] Seal to said Certificate	$ .20
Certificate of Clerk to Original Exhibits, 1 folios at 15¢	$ .15
Seal to said Certificate	$ .20

I hereby certify that the above cost for preparing and certifying recording, amounting to $26.90, has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court,

at Yakima, in said District, this 7th day of November, 1922.

[Seal] ALAN G. PAINE,
Clerk United States District Court for the Eastern District of Washington, Southern Division,
By Edwd. E. Cleaver,
Res. Deputy Clerk, Yakima, Washington.

[Endorsed]: No. 3941. United States Circuit Court of Appeals for the Ninth Circuit. Fairbanks, Morse & Company, a Corporation, Plaintiff in Error, vs. Levi P. Austin and Jay R. Austin, Copartners Doing Business Under the Firm Name and Style of Austin Brothers; Helen S. Austin; and Nettie M. Austin, as Trustee, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Southern Division.

Filed November 10, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.